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# PEDOPHILIA: THE LEGAL PREDICAMENT OF CLERGY

Raymond C. O'Brien\*

## INTRODUCTION

Not many days after Easter Sunday in the Spring of 1987, Reno police arrested a seventy-year-old man for "molesting a terminally ill 12 year-old boy who is mentally retarded and cannot speak."<sup>1</sup> The man surrendered to police after a nurse reported seeing the man expose himself to the boy while the boy was receiving treatment at Riverside Hospital for Skilled Care in Reno. A month earlier, the New York Court of Appeals upheld the conviction of a 49 year-old man for the crimes of rape, sodomy and sexual abuse of four boys and one girl, ages 3 and 4, who had been attending a day care center.<sup>2</sup> And finally, a 41 year-old Boy Scout leader confessed to raping or sodomizing at least 37 children.<sup>3</sup> All three of these cases could be seen as evidence of what appears to be an increasing amount of child abuse throughout the United States. But these cases evidence a more shocking predicament: the seventy-year-old molester and the Boy Scout leader who abused 37 children were ordained Roman Catholic priests, while the man convicted of abusing children ages 3 and 4 was a Methodist minister. All were clergy, older, professional, well-respected, trusted, and vowed to avoid even the contemplation of the crimes with which each was involved.

Especially during the last twenty years, law, medicine, religion and soci-

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1. L.A. Times, Apr. 25, 1987, at 28, col. 1.

2. N.Y. Times, Mar. 31, 1987, at B5, col. 4.

3. *Roman Catholic Church Discusses Abuse of Children by Priests*, N.Y. Times, May 4, 1986, § 1, at 26, col. 1; *Priest's Child-Molestation Case Traumatizes Catholic Community*, Wash. Post, June 9, 1985, at A6; col. 1. While the Reverend Gilbert Gauthé entered a plea of not guilty by reason of insanity to felony charges of sexually abusing children, he admitted the abuse, which lasted over a long period of time. In 1972, the parents of two boys confronted the priest with the abuse of their child and he agreed to counseling, but no one told his superiors. According to sworn statements, the bishop first heard of the child abuse two years later. But it was not until 1983—nine years later—that the priest was suspended from his duties by his superiors. See *Church Still On Trial in Pedophilia Crisis*, May 30, 1986, Nat'l Cath. Rep., at 1, col. 1.

ety, have been asked to respond to this predicament. What assessment can we make at this time? All indications are that the cases just described are but the discovered few. Newspapers record the pleas and lower court trials of other clergy arrested for pedophilia.<sup>4</sup> Other articles, books and televised interviews suggest that the predicament of pedophilia among clergy,<sup>5</sup> evidences more stringent reporting requirements, greater sexual promiscuity, increased awareness among children of what constitutes sexual abuse and perhaps a relativity applied to the values inherent in the religion of the cleric. Whatever the sociological cause of the dramatic evidence of pedophile clergy, the fact itself has challenged the medical community to

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4. A 47 year-old former priest who volunteered as a basketball coach at a Catholic school in Washington D.C., pleaded guilty to sodomizing a minor and to sexually abusing six other boys more than fifty times during six years. *Wash. Post*, Apr. 13, 1986, at B1, col. 1. The forty-one year old former pastor of a Catholic parish in Barstow, California, pleaded no contest to a misdemeanor charge of molesting an altar boy. *L.A. Times*, May 6, 1987, § 1, at 2, col. 3. A priest in Rhode Island pleaded no contest to 26 charges of sexually assaulting boys. *N.Y. Times*, June 25, 1986, at A14, col. 5. In Orange County, California, a 34 year old priest was charged with molesting an undisclosed number of altar boys during a 13 month period. He was eventually convicted of 26 counts of fondling children, but not nudity. *L.A. Times*, Apr. 27, 1986, § 1, at 2, col. 5; *L.A. Times*, Nov. 30, 1986, § 2, at 5, col. 2. In Newark, New Jersey, a 56 year-old Catholic priest pleaded guilty to sexually assaulting three boys, then ages 10 to 12. The boys were students at a parochial school where the priest had worked for 27 years. *N.Y. Times*, Mar. 5, 1987, at A23, col. 6. In suburban Washington D.C., a 34 year-old priest admitted to problems with drugs and alcohol and to sexually abusing three teens in five incidents from 1981 through 1985. *Wash. Post*, Dec. 23, 1986, at A6, col. 1.

5. The definition of clergy is important. Twenty-four states specifically define the term; 25 compile a list of persons considered a part of the designation; Louisiana, Nevada, and Rhode Island, make no specific definition but allow for the privilege. The term is always associated with religions, the exact definition will depend upon the particular religion involved. For purposes of this article where we are primarily concerned with the Roman Catholic Church, the definition of clergy shall include: "A person becomes a cleric through the reception of diaconate and is incardinated into the particular church or personal prelature for whose service he has been advanced." 1983 Code c. 266, § 1. Furthermore, "[a]fter it has been validly received, sacred ordination never becomes invalid. A cleric, however, loses his clerical state:

1. by a judicial decision or administrative decree which declares the invalidity of sacred ordination;
2. by the legitimate infliction of the penalty of dismissal;
3. by a rescript of the Apostolic see which is granted by the Apostolic see to deacons only for serious reasons and to presbyters only for the most serious reasons.

*Id.* at c. 290. See *In re Murtha* 115 N.J. Super. 380, 279 A.2d 889 (1971), where a nun attempted to invoke the priest-penitent privilege when asked to testify to confessions made to her by a member of the church. The court denied the privilege since *Murtha* was not a "clergyman" within the definition of the N. J. statute nor the canons of the religion. *Id.* at 383, 279 A.2d at 892. See also, *Masquat v. McGuire*, 638 P.2d 1105 (Okla. 1981) (nun was not acting as a spiritual advisor but rather as an administrator and thus could not invoke the statute). But see, *Eckmann v. Bd. of Educ.*, 106 F.R.D. 70 (E.D. Mo. 1985) (where a nun was acting as a spiritual director, she was within the general definition of clergyman and was entitled to use the privilege).

estimate the cause and cure, and the legal process to assess crime and punishment.

Medical advances have conditioned Americans to think that science can cure anything. Even when faced with the catastrophe of AIDS, many knowledgeable Americans continue to practice unsafe sex practices, often with the assumption that science will eventually find a cure that will save them. So too with pedophilia: there must be a cure. But what if there is no cure for pedophilia?<sup>6</sup> Science does offer treatment that includes psychotherapy, behavior therapy, surgery, and medication,<sup>7</sup> but the current assessment is that, "there is little convincing evidence that the traditional psychotherapies alone are an effective means for treating pedophilia."<sup>8</sup> No other modality offers a cure either. Thus, if there is no cure, what is a church superior to do with an ordained cleric who has taken vows of poverty, chastity and obedience "now and forever"? Can appointment ever be made to a ministerial function that invites association with children? Should permission be denied to even wear traditional clerical clothing—a penalty in itself under church law—if such clothing invites the trust of children? How is that religious church superior to reconcile the sacramental and scriptural doctrine of forgiveness with the legal necessity of due care? Medicine occupies an essential place in the predicament of clergy and pedophilia, but as yet it offers no panacea.

The legal process offers only consequences, criminal and civil, and there is every indication that the consequences shall continue as they have in the last twenty years: increasing punishment and civil penalties. The scope of this Article includes only that portion of child abuse that is sexual in nature,

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6. For purposes of this article,

"the term pedophilia will be used when referring to persons sexually oriented towards children, regardless of whether the children are pre- or postpubertal . . . [This definition includes three elements:] First, it is necessary to establish that the patient becomes erotically excited by the act or fantasy of engaging in sexual activities with children. Secondly, if the patient is an adult, rather than adolescent, the children must be at least ten years his junior. Finally, it must be clear that any sexual acts engaged in with children are not either due to other mental disorders such as schizophrenia, dementia or drug intoxication, or due to the lack of a suitable age-appropriate partner, which occurs in some cases of incarceration or incest."

Berlin, *Sex Offenders: A Biomedical Perspective and a Status Report on Biomedical Treatment*, in *THE SEXUAL AGGRESSOR, CURRENT PERSPECTIVES ON TREATMENT* 83, 86-87 (1983). Throughout any discussion of pedophilia in the United States, references will constantly be made to Dr. Fred S. Berlin, M.D., Ph.D. He is Associate Professor, School of Medicine, Johns Hopkins University, Baltimore, Md. He is also co-Director of the Johns Hopkins Hospital Sexual Disorders Clinic and a member of the American College of Forensic Psychiatry.

7. BERLIN & KROUT, *PEDOPHILIA: DIAGNOSTIC CONCEPTS, TREATMENT, AND ETHICAL CONSIDERATIONS* 7 (1983) [hereinafter BERLIN & KROUT, *PEDOPHILIA*].

8. *Id.*

hence defined as pedophilia. But society makes no distinction between the sexual pedophile and the physical abuser, even though there is seldom physical violence associated with pedophilia. Indeed, there is every indication that society shall react to abuse statistics with more extensive reporting requirements, more severe criminal penalties, higher civil awards for negligent or intentional torts associated with abuse, and greater laxity in the rules of evidence associated with privilege or children.<sup>9</sup>

Society, and the legal apparatus associated with it, shall certainly continue the trend begun in 1962 of protecting children from every type of abuse.<sup>10</sup> But as society justifiably penalizes every instance of abuse, including pedophilia, protected freedoms and prerogatives associated with clergy and religion are affected. For instance, for twenty-five years, states have been legislating reporting requirements,<sup>11</sup> mandating who must report instances of child abuse to the authorities. Today not only has the definition of abuse been expanded to include physical abuse, mental, emotional and sexual abuse, but also states have expanded the classes of persons who must report.

Early statutes contained reporting requirements for physicians, but today's statutes require most professionals to report.<sup>12</sup> In fact, the modern statutes address the following: First, who must report; second, reportable conditions; third, reporters' immunity; fourth, penalties for failure to report;

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9. The fact that the San Diego County district attorney was willing to charge a mother with fetal abuse when her child was born brain dead, is an indication of the extent to which society's concern over child abuse has expanded. See, Wash. Post, Oct. 2, 1986, at A17, col. 1. Also, during the final weeks of its 1987 session, the Supreme Court decided in *Kentucky v. Stincer*, 107 S.Ct. 2658 (1987), that defendants in child abuse cases "do not have a constitutional right to be present at hearings held to determine a child's competency to testify." See, Wash. Post, Jun. 20, 1987, at A14, col. 1.

10. CHILDREN'S BUREAU, U.S. DEP'T OF HEALTH, EDUC. AND WELFARE, *THE ABUSED CHILD: PRINCIPLES AND SUGGESTED LANGUAGE FOR LEGISLATION ON REPORTING OF THE PHYSICALLY ABUSED CHILD* (1963). More recent examples: I. SLOAN, *CHILD ABUSE: GOVERNING LAW & LEGIS. LEGAL ALMANAC SERIES NO. 79*, (1983) [hereinafter I. SLOAN, *CHILD ABUSE*]; John, *Child Abuse—The Battered Child Syndrome* in 2 AM. JUR. 2d PROOF OF FACTS, § 14-24, at 415-26 (1974 & Supp. 1986).

11. The earliest reporting statutes required physicians to report suspected cases of abuse because it was assumed that physicians would most frequently be the first to see such harm to a child. See COUNCIL OF STATE GOV'TS, *SUGGESTED STATE LEGISLATION* 66, 67-68 (1965).

12. See I. SLOAN, *CHILD ABUSE* *supra* note 10, at 17-31; see also the Federal Child Abuse Prevention and Treatment Act, 42 U.S.C. §§ 5101-5107 (1982 & Supp. 1985). In the area of family law, the federal government often provides the impetus for states to draft legislation to address a particular problem. See Child Support Enforcement Amendments of 1984 Pub. L. 98-378, requiring the states to have enforcement procedures to collect support payments for children. Also, as it relates to the states' use of custody determinations under any one state's adoption of the Uniform Child Custody Jurisdiction Act, pertinent is the federal Parental Kidnapping Prevention Act of 1980 ("PKPA"), 28 U.S.C.A. § 1738A (Spec. Pamp. 1981).

and fifth, the abrogation or application of certain privileges.<sup>13</sup> Must a cleric report abuse? An ordained cleric could certainly be considered a professional, but is matter told in a confessional setting subject to reporting? What is a confessional setting? Can failure to report result in criminal penalties under the act, or even civil damages because failure to report is negligence *per se*? And if the state has always privileged any communications between such professionals as priest-penitent, should that privilege be allowed when the offense is as serious as child abuse? The needs of society, the inability of science to provide a definitive cure, and the constitutional and traditional prerogatives allowed clergy, have created a modern predicament for which there is no easy solution.

This Article identifies the present posture of child abuse and admits that the incidence of child sexual abuse among members of the clergy is documented. Indeed, incidents of child abuse seem to be more common each day throughout all segments of the population. This has affected public trust and the public has responded by revoking such traditional clerical prerogatives as the priest-penitent privilege, developing a theory of abuse in gestation, and demanding better treatment for offenders through therapy.

The precise scope of this Article is to offer recommendations concerning the legal, medical and social predicament of pedophilia regarding issues that affect clergy. Rather than avoid the issue, the Article further admits that society is justified in seeking redress through the criminal process and that victims are entitled to fair compensation in the civil courts. Clerics are not immune from this redress. Nonetheless, the focus of the Article is upon recommendations that will address the needs of all involved. Because children are involved, emotions can predominate, but when asking legislators and society to address the predicament, reason must predominate.<sup>14</sup> Thus, Part I will address the issue of abuse; Part II the medical evidence available to

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13. Mitchell, *Must Clergy Tell? Child Abuse Reporting Requirements Versus the Clergy Privilege and Free Exercise of Religion*, 71 MINN. L. REV. 723, 728 [hereinafter Mitchell, *Must Clergy Tell?*]. This article is an excellent summary of the yet to be decided issue of whether clergy may be forced to report under these reporting statutes when the clergy claims the communication is privileged.

14. One of the leading researchers in the medical field of pedophilia is Fred S. Berlin, M.D., Ph.D. He stresses the need to address the ethical response to the person who is defined as a pedophile. When writing about this emotional issue he writes:

The values we try to instill in our children are important. Almost two thousand years ago as an outraged crowd attempted to stone to death a woman whose sexual behavior they considered offensive, one man stepped forward to stop the retribution, speaking against such revenge while espousing values such as compassion, understanding, forgiveness, and reformation. He asked that persons be judged not simply by their behavior but with some appreciation for their humanity.

BERLIN & KROUT, *PEDOPHILIA*, *supra* note 7, at 11.

address the problem; Part III the criminal and civil law violations; and finally, Part IV will offer recommendations.

### I. THE ISSUE OF ABUSE

Emotion can predominate when speaking of religion or children; when the two are in conflict, reason can suffer. Thus, "[T]he choice between jailing clergy and giving up evidence of child abuse must be a dire one."<sup>15</sup> The proponents of religion and the sanctity of such sacramental institutions as confession or confessional counseling are often on one side of the issue, while persons seeking to protect the rights of children are on the other. Nonetheless, reducing this painful and complicated predicament to such a simplistic conflict is superficial<sup>16</sup> and shall surely result in confusion and litigation<sup>17</sup> when challenge comes from either the religious or the child protective faction. But today there seems to be such overwhelming evidence of child abuse that reason may suffer. *The New York Times* quotes Dr. A. Nicholas Groth, Director of the Sex Offender Program at the Connecticut Correctional Institute, as saying: "The dimensions of the abuse are staggering."<sup>18</sup> Dr. Groth has studied 1,000 child molesters over the past 16 years and when he considers the number of children affected by the molesters, he admits, "[I]f we saw these same numbers of children suddenly developing some kind of illness, we'd think we had a major epidemic on our hands."<sup>19</sup>

Child sexual abuse also seems to be a national problem. The American Humane Association's national survey of state child protection statistics shows a 200 percent increase in the reporting of sexual abuse since 1976. Furthermore, studies show that most incidents are unreported. "But a new

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15. Mitchell, *Must Clergy Tell?*, *supra* note 13, at 723.

16. Professor Mary Harter Mitchell, *supra* note 13, initiates her article concerning the child abuse reporting requirements of clergy by exposing the "superficiality of characterizing the conflict between clergy privilege and child abuse reporting requirements as a choice between protecting secrets and protecting children." *Id.* at 724. Rather, she states: "Given the momentous interests potentially at stake, the issue should be carefully analyzed . . ." *Id.* at 824. "The resolvers of the dilemma must proceed with informed concern for the children, with sensitivity to the less perceptible values of free religious practice and the beneficence of effective ministries, and with the appropriate humility concerning anyone's abilities either to judge or to effect a child's best interests." *Id.* at 824.

17. See, e.g., Op. Tex. Att'y Gen. No. JM-342 (Aug. 5, 1985). The State of Texas abrogates all privilege when it comes to reporting child abuse except that between attorney and client: "In any proceeding regarding the abuse or neglect of a child or the cause of any abuse or neglect, evidence may not be excluded on the ground of privileged communications except in the case of communications between attorney and client." TEX. FAM. CODE ANN. § 34.04 (Vernon 1986).

18. *Studies Find Sexual Abuse of Children is Widespread*, N.Y. Times, May 13, 1982, at C1, col. 1.

19. *Id.*

study of sexual offenders shows that each was responsible for completing or attempting an average of 68 child molestations. This was three times the average number of rapes of adult women attempted by those offenders studied."<sup>20</sup> Indeed, Dr. Gene G. Abel, who is a professor of clinical psychiatry at the Columbia University College of Physicians and Surgeons, states that offenders "molest many more children than had previously been suspected, and child molestation is a more frequent and serious crime than we had supposed."<sup>21</sup>

Often the sexual abuse is associated with, or assimilated into, other forms of abuse identified as physical, emotional or mental. Much of the literature concerning abuse makes no accurate distinctions, but simply refers to "child abuse" whether the injury is immediate or becomes apparent in the future.<sup>22</sup> This makes abuse even more difficult to estimate, with reports ranging from a few thousand to over a million incidents per year.<sup>23</sup> But all experts agree that the problem is serious and the actual amount of abuse is higher than that reported.<sup>24</sup>

The age of the child invites particular import because society will be more

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20. *Id.* The study was done by Dr. Gene G. Abel, Director of the Sexual Behavior Clinic of the N.Y. State Psychiatric Institute at Columbia-Presbyterian Medical Center in Manhattan. There were 192 male child molesters studied so as to assist in developing a model treatment program. Previously the Clinic studied 238 male sex offenders in New York and Memphis and of these people studied, they had attempted or completed 16,666 acts of child molestation.

21. *Id.*

22. *See, e.g.,* HURT, CHILD ABUSE AND NEGLECT: A REPORT ON THE STATUS OF THE RESEARCH 11-12 (1979) [hereinafter HURT, CHILD ABUSE AND NEGLECT] (description of the results of child abuse and neglect); EXPLORING THE RELATIONSHIP BETWEEN CHILD ABUSE AND DELINQUENCY (R. Hunner and Y. Walker, eds. 1981). Particularly with child sexual abuse, the effects are often not immediate, but only manifested in some other anti-social behavior in the future. Causality between child sexual abuse and future such abuse by victims is apparent. I. SLOAN, CHILD ABUSE, *supra* note 10 at 1-14 (offers an outline of the categories of abuse and the indications of each). *See also*, BLACK'S LAW DICTIONARY 217 (5th ed. 1979).

23. Christiansen, Educational and Psychological Problems of Abused Children 13 (1980) [hereinafter CHRISTIANSEN]. *See also*, DELEGATE WORKBOOK, WHITE HOUSE CONFERENCE ON FAMILIES, 65 (1980) [hereinafter DELEGATE WORKBOOK]. The statistics presented by the White House Conference were as follows: "Physical abuse occurred in 22.6% of the reported cases; sexual abuse in 6.2%; emotional abuse 22.4%; neglect 86.4%; other forms of maltreatment 11%. (These total more than 100% because many children are subject to more than one form of abuse)."

24. Even though somewhat dated, the White House Conference reported: "Estimates of child abuse range to more than 1 million cases annually. Reported cases are on the increase - from 400,000 in 1975 to 600,000 in 1976. In 1975 more than 2,000 children . . . were killed by their parents." One expert states that more children under the age of five die from injuries inflicted by parents or guardians than from tuberculosis, whooping cough, polio, measles, diabetes, rheumatic fever, and appendicitis, combined. DELEGATE WORKBOOK, *supra* note 23, at 65.



aggressive in protecting those least able to protect themselves. The age of the victim ranges from a few weeks to adolescents, but as many as perhaps 51 percent are children under the age of seven. Indeed, a White House Conference reported that, "[T]he younger the child, the greater the risk of abuse. . . Children under the age of three are most vulnerable."<sup>25</sup> And while the abuser can be a person in whom the parents have placed their trust and confidence, estimates range between 50 to 83 percent of the cases that the parent is the abuser himself or herself.<sup>26</sup> More than likely these are parents living under stress<sup>27</sup> such as loss of income, other family violence such as spouse abuse, or the child was unexpected or now unwanted.<sup>28</sup> More often than not the parent is a child herself (sometimes himself) and also psychologically or emotionally impaired.<sup>29</sup> Particularly with child sexual abuse, the parent was abused as a child,<sup>30</sup> and while most reports and statistics refer to the male child abuser, women do commit physical, emotional, mental and sexual abuse.

Society will correctly reflect upon these statistics and conclude that something must be done. There is an identifiable trend since the early 1960's to prevent child abuse. This is why the reporting statutes were expanded to include more reportable circumstances than physical abuse, and the class of persons who must report was expanded beyond physicians.<sup>31</sup> States began

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25. *Id.* at 65.

26. Christiansen, *supra* note 23, at 22. The studies placing the percentage at the lower end have a significant number of unidentified abusers.

27. See, e.g., HURT, CHILD ABUSE AND NEGLECT, *supra* note 22, at 8-10, for a discussion of the environmental factors that most commonly contribute to a parent abusing a child.

28. See, e.g., HOROWITZ & DAVIDSON, LEGAL RIGHTS OF CHILDREN 266 n. 16 (1984). The authors cite a study done in 1979 in which nearly 50% of the suspected child abusers were on welfare or public assistance. They are quoting KADUSHIN, CHILD WELFARE SERVICES 245-55 (2d ed. 1974). They stress however that this does not mean that the poor are more likely to abuse their children, but only that the poor are more likely to be reported because of the frequent visitations made by social workers. Nonetheless, stress related to loss of income has been established as contributing to child abuse, perhaps more to physical than sexual.

29. See HURT, CHILD ABUSE AND NEGLECT, *supra* note 22, at 8. "[P]arents of abused children are typically immature, dependent, impulsive, rigid, self-centered, and rejecting." Furthermore, researchers have described "the abusive parent as one with personality inadequacies . . . . The parent becomes sadistic in displacing aggression which results from domestic and marital relationships."

30. For a discussion of the tendency of those who have been abused to abuse others, see MOYNIHAN, The Changing American Family 35-37 (1979). See also N.Y. Times, May 13, 1982, at C10, col. 4 where Dr. Groth comments on the reason why a person becomes a pedophile: "There has usually been trauma or victimization during the offender's formative years." Of the imprisoned offenders he has studied, 80% of them were themselves sexually abused as children. "About 25% of these were abused by women - baby sitters, relatives or caretakers. Often abuse by women isn't usually reported because somehow a young boy is considered lucky to have a teacher. But these boys do not experience it that way."

31. Some states expressly require clergy to report instances of abuse, using words such as

allowing for anonymous reporting as long as the reporter acted in good faith, and immunity was granted for temporary removal of a child from unsafe circumstances or for taking photographs or x-rays.<sup>32</sup> States gave substance to the duty to report by providing for criminal penalties and a civil liability in some instances.<sup>33</sup> And states modified traditional privileges between parent-child, doctor-patient, and priest-penitent in the context of child abuse, retaining only that between the attorney and the client.<sup>34</sup> Indeed, four states seemed to have ignored the first amendment constitutional issues involved in free exercise and expressly abrogated the clergy privilege in the context of child abuse.<sup>35</sup>

There has therefore been a definite shift in the posture of the public and the law during the last twenty-five years.<sup>36</sup> Child abuse has "come out of the closet" and with it has come a change in the definition of who must report

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"clergyman" or "priest, minister or rabbi." See e.g., CONN. GEN. STAT. ANN. § 17-38(b) (1975 & West Supp. 1987); MISS. CODE ANN. § 43-21-353, 23-9 (1981 & Supp. 1987); NEV. REV. STAT. § 432B.220(2)(d) (1985); N.H. REV. STAT. ANN. § 169-C:29 (Supp. 1986). For a summary of who must report, see e.g., Sussman, *Reporting Child Abuse: A Review of the Literature*, 8 FAM. L.Q. 245 (1974).

32. See Mawdsley & Permuth, *Child Abuse Reporting: A Search for an Acceptable Balancing of Interests*, 9 NOLPE SCH. L.J. 115 (1981).

33. Some states expressly allow for a civil cause of action against a person who has a duty to report, but who, because he or she failed in that duty, allowed abuse to occur. See e.g., ARK. STAT. ANN. § 42-816 (Supp. 1985); COLO. REV. STAT. § 19-10-104(4) (1986); IOWA CODE ANN. § 232.75 (1985 & West Supp. 1987); MICH. COMP. LAWS ANN. § 722.633 (West Supp. 1986); N.Y. SOC. SERV. LAW § 420 (McKinney 1983). Whether a cleric could be liable for negligence shall be discussed *infra* Part IV.

34. See, e.g., TEX. FAM. CODE ANN. § 34.04 (Vernon 1986); 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2286 (rev. ed. 1961).

35. See generally Note, *When Must a Priest Report Under A Child Abuse Reporting Statute? — Resolution of the Priests' Conflicting Duties*, 21 VAL. UNIV. L. REV. 431 (1987). (argues that the priest-penitent privilege should be retained because it is grounded upon constitutional considerations). For states that have abrogated the privilege, see ARK. STAT. ANN. § 42-815 (Supp. 1985); IDAHO CODE § 16-1620 (Supp. 1986); LA. REV. STAT. ANN. § 14:403(F) (West 1987); WASH. REV. CODE § 26.44.060 (3) (1986). It is important to note the recent date of each of these statutes. The constitutional issues have yet to be addressed, *but see* Mitchell, *Must Clergy Tell?* *supra* note 13, at 723.

36. In its effort to address the issue of child abuse, society seems particularly willing to forget the long history of the priest-penitent privilege and the purposes for which it was established. For a review of the history, see Fraser, *A Glance at the Past, A Gaze at the Present, A Glimpse at the Future: A Critical Analysis of the Development of Child Abuse Reporting Statutes* 54 CHI.-KENT L. REV. 641 (1977-78); Tinnelly, *Privileged Communication to Clergymen*, 1 CATH. LAW. 98 (1955); *Developments in the Law—Privileged Communications* 98 HARV. L. REV. 1450 (1985); STONE & LIEBMANN, *TESTIMONIAL PRIVILEGES* 1.01 (1983); 8 J. WIGMORE, WIGMORE ON EVIDENCE § 2286 (rev. ed. 1961); Callahan, *Historical Inquiry into the Priest-Penitent Privilege*, 36 JURIST 328 (1976); TIEMANN & BUSH, *THE RIGHT TO SILENCE: PRIVILEGED CLERGY COMMUNICATIONS AND THE LAW* (2d ed. 1983); Regan & Macartney, *Professional Secrecy and Privileged Communications*, 2 CATH. LAW. 3 (1956); POLLOCK & MAITLAND, *A HISTORY OF ENGLISH LAW* 132-35 (2d ed. 1898).

abuse, the conditions that will warranted charges of child abuse, greater immunity for reporters so that abuse may be identified, abrogation of certain sacrosanct privileges, and more severe criminal and civil penalties for failure to report. While some of these penalties may conflict with constitutional guarantees and thus their availability made brief, the point is that there has been a shift in attitude and response. There is no indication that the attitude of condemnation shall change.

Within this context of the trend towards greater protection of children from abuse, should be placed increased demands for the protection from prenatal abuse.<sup>37</sup> Separate from the issue of abortion and termination of pregnancy, courts and legislators today are debating the expansion of abuse and neglect statutes to protect the unborn human from such abusive acts as alcohol, narcotics, smoking, refusing medical treatment, and maternal infections that could result in AIDS or other complications associated with pregnancy. Medical advances and scientific studies have made such abuse liability verifiable and the attention of the public has been drawn to it through the media<sup>38</sup> and association with postnatal abuse concern.

It is only logical that abuse statutes that centered upon the physical, mental, emotional or sexual abuse of children would seem applicable to the abuse of children who had been "harmed" during pregnancy and then been born with evidence of that "harm." Law reviews have called attention to this logic.<sup>39</sup> And in the past several years, there has arisen many commenta-

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37. The term prenatal means "prior to birth" and refers to both the care of the woman during pregnancy and the growth and development of the unborn person. *See generally*, MOSBY'S MEDICAL AND NURSING DICTIONARY 880 (1983); BLACK'S LAW DICTIONARY 479 (5th. ed. 1979), (the term "*en ventre sa mere*" means in its mother's womb and commonly refers to an unborn child). The term "quick child" refers to an unborn child that has grown to the point where it moves within its mother's womb. *Id.* at 1122.

38. Both popular media and government publications have drawn attention to prenatal abuse. *See* DEVELOPMENTAL CONSEQUENCES OF MATERNAL DRUG USAGE DURING PREGNANCY, CURRENT RESEARCH ON THE CONSEQUENCES OF MATERNAL DRUG ABUSE, NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH 59, 96 (1985); APPENDIX—MATERNAL-FETAL TRANSFER OF ABUSED SUBSTANCES: PHARMACOKINETICS AND PHARMACODYNAMIC DATA, PRENATAL DRUG EXPOSURE: KINETICS AND DYNAMICS, NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH 60 at 110 (1985); PLACENTAL TRANSFER OF DRUGS, ALCOHOL, AND COMPONENTS OF CIGARETTE SMOKE AND THEIR EFFECTS ON THE HUMAN FETUS, PRENATAL DRUG EXPOSURE: KINETICS AND DYNAMICS, NATIONAL INSTITUTE ON DRUG ABUSE RESEARCH MONOGRAPH 6098 § 98 (1985); *Drugs—Risks Versus Benefits*, PARENT'S MAGAZINE, July 1983, at 77; *Can Drinking, Smoking, and Pills Harm Your Unborn Baby?*, GLAMOUR, Oct. 1981, at 77; *Fetal Alcohol Syndrome Advisory Debated*, 214 SCIENCE, Nov. 6, 1981, at 642; *Drinking For Two—A New Warning To Mothers To Be*, MCCALLS, June 1985, at 37; Boodman, *Born Dying: AIDS 2nd Generation*, Wash. Post, Mar. 23, 1987, at A1, col. 1.

39. *See* Parness, *The Abuse and Neglect of the Human Unborn: Protecting Potential Life*, 20 FAM. L.Q. 197, 208 (1986); Myers, *Abuse and Neglect of the Unborn: Can The State Inter-*

ries concerning the emergence of a legal doctrine recognizing fetal legal rights,<sup>40</sup> and the potential conflict with the rights of the mother, a woman.<sup>41</sup> Indeed, advocates for women's rights are vociferous in their questioning of the rights of a fetus<sup>42</sup> when the health or privacy of the woman-mother is in conflict. But a distinction can be made between those choices a woman makes concerning her own health and well being that affect a fetus, and the choices a woman makes in regards to sexual habits, diet, alcohol and narcotics that affect a fetus. The former is not the subject of this Article nor does it come under the scrutiny of state abuse statutes. The latter however, is the arena of abuse and the subject of possible reporting and prosecution of the woman-mother.<sup>43</sup>

Surely if legislators and courts are willing to identify and prosecute mothers<sup>44</sup> and abrogate traditional immunities as existing between parent-

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vene? 23 DUQ. L. REV. 1, 11 (1984); Parness & Pritchard, *To Be Or Not To Be: Protecting the Unborn's Potentiality of Life*, 51 U. CIN. L. REV. 257 (1982); Note, *The Law and the Unborn Child: The Legal and Logical Inconsistencies*, 46 NOTRE DAME L. REV. 349 (1971).

40. See, e.g., Nelson, Buggy & Weil, *Forced Medical Treatment of Pregnant Women: Compelling Each to Live as Seems Good to the Rest*, 37 HASTINGS L.J. 703 (1986); Johnsen, *The Creation of Fetal Rights: Conflicts With Women's Constitutional Rights: Liberty, Privacy, and Equal Protection*, 95 YALE L.J. 599 (1986); Note, *Recovery for Prenatal Injuries: The Right of a Child Against Its Mother*, 10 SUFFOLK U.L. REV. 582 (1976); Parness, *The Duty to Prevent Handicaps: Laws Promoting the Prevention of Handicaps to Newborns*, 5 W. NEW ENG. L. REV. 431 (1983); Note, *Fetal Rights: Defining 'Person' under 42 U.S.C. § 1983*, U. ILL. L. REV. 347 (1983); Note, *The Fetal Patient and the Unwilling Mother: A Standard for Judicial Intervention*, 14 PAC. L.J. 1065 (1983); Lenow, *The Fetus as a Patient: Emerging Rights as a Person?*, 9 AM. J.L. & MED. 1 (1983).

41. For an article that analyzes fetal rights primarily in light of the medical intervention and bodily integrity case law, see, Gallagher, *Prenatal Invasion & Interventions: What's Wrong with Fetal Rights*, 10 HARV. WOMEN'S L.J. 9 (1987) [hereinafter Gallagher]. (The author argues that, "The Caesarean section and other fetal rights' cases possess great symbolic and precedential significance, but they have less to do with the status of the fetus than with the moral and legal status of women." *Id.* at 58.)

42. Robertson, *Protective Liberty and the Control of Conception, Pregnancy, and Child-birth*, 69 VA. L. REV. 405 (1983); Cantor, *A Patient's Decision to Decline Lifesaving Medical Treatment: Bodily Integrity Versus the Preservation of Life*, 26 RUTGERS L. REV. 228 (1973); Clarke, *The Choice to Refuse or Withhold Medical Treatment: The Emerging Technology and the Medical-Ethical Consensus*, 13 CREIGHTON L. REV. 795 (1980).

43. Some authors seem to make no distinction between medical treatment of the mother and the mother's use of alcohol, cigarettes, sex or narcotics. See, e.g., Gallagher *supra* note 41, at 57-58: "Until the child is brought forth from the woman's body, our relationship with it must be mediated by her. The alternative adopts a brutally coercive stance toward pregnant women, viewing them as vessels or means to an end which may be denied the bodily integrity and self-determination specific to human dignity."

44. The State of California prosecuted Pamela Rae Stewert for the violation of the California Penal Code, which states "that one who willfully omits, without lawful excuse, to furnish necessary clothing, food, shelter, medical attendance or other remedial care for his or her child," is guilty of child abuse. CAL. PENAL CODE § 270 (West 1987). The case was reported throughout the media. See, e.g., Wash. Post, Oct. 2, 1986, at A1, col. 1; L.A. Daily J., Oct. 8,

child,<sup>45</sup> the prosecution or civil responsibility of other sacrosanct persons is sure to follow. Thus, fetal abuse debate affects the societal perception or prosecution of clergy abuse, and any immunity clergy may have enjoyed.

Even those who criticize fetal rights, would admit there is a definite trend towards affording a legal status for the fetus.<sup>46</sup> The unborn human has long had rights in the law of property and inheritance.<sup>47</sup> In 1981, the Georgia Supreme Court in *Jefferson v. Griffin Spalding County Hospital Auth.*,<sup>48</sup> accorded the unborn human legal status in equity. The court upheld a juvenile court order authorizing the hospital to perform a cesarean section delivery over the mother's objections on religious grounds. The mother was diagnosed with placenta previa and was told that without such an operation there was a 99 percent certainty the child would not survive vaginal delivery.<sup>49</sup> In identifying its public policy for ordering the cesarean section, the

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1986 at 1, col. 2, USA Today, Feb. 27, 1987, at A4, col. 1. (Her son, Thomas Travis Edward Monson, was born brain dead, but the criminal prosecution was dismissed by a San Diego municipal judge on Feb. 26, 1987 because the Cal. Penal Code Sec. 270 was to be used solely as a child support statute.)

45. The parental immunity doctrine was judicially created in 1891. In preventing civil suit, the doctrine stated:

[T]he peace of society, and of the families composing society and a sound public policy, designed to subserve the repose of families and the best interests of society, forbid to the minor child a right to appear in court in the assertion of a claim to civil redress for personal injuries suffered at the hands of the parent.

*Hewellette v. George*, 68 Miss. 703, 711, 9 So. 885, 887 (1891). See *McKelvey v. McKelvey*, 111 Tenn. 388, 77 S.W. 664 (1903); *Roller v. Roller*, 37 Wash. 242, 79 P. 788 (1905). But there is a trend today to abrogate the immunity. See, e.g., Note, *Torts, the Abolishment of the Parental Immunity Doctrine-Children May Recover Damages from Parents in Personal Injury Actions*, 11 U. DAYTON L. REV. 737 (1986); 59 AM. JUR. 2d, *Parent and Child* § 152 (1971); *Gelbman v. Gelbman*, 23 N.Y.2d 434, 245 N.E.2d 192, 297 N.Y.S. 2d 529 (1969). In *Gelbman*, the court, in abolishing the immunity doctrine, said the policy to preserve family harmony was removed by compulsory automobile insurance.

46. While the article does not specifically mention child abuse in utero, the former Director of the Civil Liberties & Public Policy Program at Hampshire College writes:

Fetal rights advocates assert that the courts' expansion of causes of action for wrongful death and for injuries sustained in utero indicates a trend toward full legal status for the fetus. They maintain that the determinative issue in such cases has been the fetus' biologically independent existence. In this view, the courts have replaced the traditional birth requirement for tortious liability with a new viability line' that recognizes the fetus' genetic individuality and its possible capacity for survival before full term delivery. *Id.* at 37-38. This author thus argues that any inquiry as to medical rights of the fetus or any discussion of abuse, should not take place until after the birth of the fetus.

47. In New York, one court has stated: "It has been the uniform and unvarying decision of all common law courts in respect to estate matters for at least the past two hundred years that a child en ventre sa mere is born' and alive' for all purposes for his benefit." In re *Helthausen's Will*, 175 Misc. 1022, 1024, 26 N.Y.S.2d 140, 143 (1941).

48. 247 Ga. 86, 274 S.E.2d 457 (1981).

49. *Id.* at 87, 274 S.E.2d at 458.

court stated that the state had an interest in the life of the unborn, and that the intrusion into the mother's life was far outweighed by the duty of the state to protect an unborn from meeting death before being given the opportunity to live.<sup>50</sup> It is important to note that in this very recent case, the court was willing to afford protection to a fetus, even when this conflicted with the religious rights of the mother and it involved a medical procedure that came within the penumbra of privacy.

Criminal law has historically debated the rights of unborn humans<sup>51</sup> and today, in an effort to avoid entanglement with abortion, most states do not define person as including an unborn human. Because of technological advancements and arguments such as that of Justice Sandra Day O'Connor in the dissent to *City of Akron v. Akron Health Center for Reproductive Health*,<sup>52</sup> where she finds that potential life is no less potential during the first trimester than it is after the viability of the fetus, there is increasing legal and medical concern for fetal rights.<sup>53</sup> Viability is an arbitrary point in regards to the potentiality of prenatal life.<sup>54</sup> The state should have a compelling interest in protecting potential life throughout a woman's pregnancy.<sup>55</sup> Some states have sought to avoid the abortion controversy, and at the same time include the fetus in the definition of person.<sup>56</sup> But when seeking to summarize the existing statutes and cases, there is little overt protection of the

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50. *Id.* at 89, 274 S.E.2d at 460.

51. The common law historically held that a person administering drugs or medication to a woman quick with child for the sole purpose of causing a miscarriage is guilty of a misdemeanor, and if the child was "born alive" but later died as a result of such prenatal injuries, the crime was murder. PERKINS & BOYCE, 50 CRIM. L. 188 (3d ed. 1982). This common law "born alive" rule is read as defining another human being as one who has been born and is alive. See MODEL PENAL CODE § 210 comment 4(c) (1980). New York and Texas are but two of several states following the "born alive" rule in homicide and explicitly excluding an unborn human from the definition of person. N.Y. PENAL LAW § 125.05(1) (McKinney 1975); TEX. PENAL CODE ANN. § 1.07 (17) (Vernon 1974).

52. 462 U.S. 416, 103 S.Ct. 2481, 2505 (1983). The majority rejected a number of state requirements that hampered a woman's right to an abortion. See also *Roe v. Wade*, 410 U.S. 113 (1973).

53. See 462 U.S. at 461.

54. *Id.*

55. *Id.*

56. Cal. Penal Code § 187 (West 1984):

(a) Murder is the unlawful killing of a human being, or a fetus, with malice aforethought.

(b) This section shall not apply to any person who commits an act which results in the death of a fetus if any of the following apply:

(1) The act complied with the Therapeutic Abortion Act, Chapter 11 (commencing with Section 25950) of Division 20 of the Health and Safety Code.

(2) The act was committed by a holder of a physician's and surgeon's certificate, as defined in the Business and Professions Code, in a case where, to a medical certainty, the result of childbirth would be death of the mother of the

fetus within criminal law.<sup>57</sup> If change is to come, perhaps it will be a result of developments in tort law.<sup>58</sup>

Tort law is more cognizant of prenatal rights today,<sup>59</sup> and there is every reason to think that there will be a continuing trend towards the recognition of prenatal torts for viable<sup>60</sup> and for not-yet-viable fetuses.<sup>61</sup> Advancement

fetus or where her death from childbirth, although not medically certain, would be substantially certain or more likely than not.

(3) The act was solicited, aided, abetted, or consented to by the mother of the fetus. (c) Subdivision (b) shall not be construed to prohibit the prosecution of any person under any other provision of law.

57. In *Hollis v. Commonwealth*, 652 S.W.2d 61 (Ky. 1983), the Kentucky Supreme Court dismissed the charge of murder against the defendant when the man forced his hand up his estranged wife's vagina and caused the death of her twenty-eight to thirty week old child. The child was not "born alive" for purposes of the murder statute. *Id.* at 62. See *People v. Greer*, 79 Ill.2d 103, 402 N.E.2d 203 (1980) (Criminal charge was dismissed when defendant caused the death of his girlfriend's fetus). But see *Commonwealth v. Cass*, 392 Mass. 799, 467 N.E.2d 1324 (1984), where the Massachusetts court allowed the vehicular homicide statute to include an unborn human within its definition of "person" even when there was no express statutory authority. Nonetheless, only "viable" fetuses were "persons." *Id.*

58. In the area of torts, courts and legislatures are allowing recovery for both pre- and post-conception torts. See *infra* note 60. The only reluctance appears to be to allow recovery prior to conception for fear that such recovery would result in increased litigation, and the traditional concerns of duty, foreseeability and causation. See generally Collins, *An Overview and Analysis: Prenatal Torts, Preconception Torts, Wrongful Life, Wrongful Death, and Wrongful Birth: Time for a New Framework*, 2 J. FAM. L. 677 (1983).

59. See, e.g., Note, *Parental Liability for Preconception Negligence: Do Parents Owe a Legal Duty to their Potential Children?* 22 CAL. W. L. REV. 289 (1986). See also *Dietrich v. Inhabitants of Northampton*, 138 Mass. 14 (1884). Justice Holmes established the "entity theory" which disallowed recovery for prenatal torts since the mother and the child were one entity—inseparable—and the child could not sue on his or her own behalf. *Id.* at 63. But see *Bonbrest v. Kotz*, 65 F. Supp. 138 (D.D.C. 1946), the first case to recognize a legal action by a viable fetus taken from its mother's womb through professional malpractice. The court's reasoning in changing the common law was influenced by the dissenting opinion of Justice Boggs in *Dietrich* at 368-74, 56 N.E. at 640-42, and progressing medical technology implicitly recognized by Chief Justice Stone:

If with a discerning eye, we see differences as well as resemblances in the facts and experiences of the present when compared with those recorded in the precedents, we take the decisive step toward the achievement of a progressive science of law. If our appraisals are mechanical and superficial, the law which they generate will likewise be mechanical and superficial, to become at last but a dry and sterile formalism.

*Bonbrest* at 142.

60. In *Bonbrest* the court defined "viable" as a fetus that had reached the stage of development which would allow it to live outside the womb. *Bonbrest* at 140. See generally W. KEETON, PROSSER AND KEETON ON THE LAW OF TORTS 55 (5th ed. 1984); *Allaire v. St. Luke's Hospital*, 184 Ill. 359, 56 N.E. 638 (1900). (The majority decided that no legal duty was owed to someone not yet a person and legally considered only a fictitious being. *Id.* at 368, 56 N.E. 639). Subsequently, *Allaire* was overruled in *Amann v. Faigy*, 415 Ill. 422, 114 N.E.2d 412 (1953).

61. Even though the court in *Bonbrest* limited recovery to viable fetuses, there is criticism of this criterion. See, e.g., *Renslow v. Mennonite Hosp.*, 67 Ill.2d 348, 367 N.E. 2d 1250 (1977)

in health and medical technology is the catalyst for change:

As medical science progressed, the courts took notice that a fetus is a separate human entity prior to birth. It is by now commonly accepted that at conception the egg and sperm unite to jointly provide the genetic material requisite for human life. Thus, various courts have gradually come to recognize that the embryo, from the moment of conception, is a separate organism that can be compensated for negligently inflicted prenatal harm.<sup>62</sup>

But any change that comes will concentrate on either the legislative or judicial interpretation of "person" and consequences for protected structures or doctrines such as parent-child, privacy, and the present posture of courts to practice judicial restraint.

New Jersey is one state where judicial restraint has not forestalled its desire to extend protection to the unborn. Even though the legislature had not expressly included the unborn within the protection of its statutes,<sup>63</sup> the ju-

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(where the court allowed an action for preconception torts); RESTATEMENT (SECOND) OF TORTS § 869 (1977) (which rejects viability as a criterion for civil redress in prenatal torts: one who tortiously causes harm to an unborn child is subject to liability to the child for the harm if the child is born alive); *Sylvia v. Gobeille*, 101 R.I. 76, 220 A.2d 222 (1966) (where the court held that there was no precise moment of fetal development when the child attains the capability of an independent existence, "and we reject viability as a decisive criterion.") *Id.* at 3250, 367 N.E.2d at 1252.

62. Annotation *Liability for Prenatal Injuries*, 40 A.L.R.3d 1222, 1230 (1971). For cases rejecting the viability or the entity theory, see, e.g., *Kelly v. Gregory*, 282 A.D. 542, 544-45, 125 N.Y.S.2d 696, 697 (1953), (court held that the legal entity of the child began at the time of biological separability of the fetus from the mother which coincides with conception, and that a child born alive may recover for prenatal injury tortiously inflicted at any time at or after conception regardless of whether the fetus is viable). *Id.* at 544-45, 125 N.Y.S.2d 697. But see *Albala v. City of New York*, 54 N.Y.2d 269, 429 N.E.2d 786, 445 N.Y.S.2d 108 (1981), where the court rejected an action for preconception torts. The court stated that recognition of such a cause of action would require the extension of traditional tort concepts beyond manageable bounds, and that foreseeability alone is not enough to assert a duty. *Id.* at 270, 429 N.E.2d at 787, 445 N.Y.S.2d at 109. There are only three jurisdictions which recognize a cause of action based on preconception torts. *Jorgensen v. Meade Johnson Laboratories, Inc.*, 483 F.2d 237 (10th Cir. 1973); *Renslow v. Mennonite Hosp.*, 67 Ill. 348, 367 N.E.2d 1250 (1977); and *Bergstresser v. Mitchell*, 577 F.2d 22 (8th Cir. 1978).

63. Today, the N.J. statute includes the unborn under its protection. See N.J. STAT. ANN. § 30:4C-11 (West 1981):

Whenever it appears that any child within this state is of such circumstances that his welfare will be endangered unless proper care or custody is provided, an application setting forth the facts in the case may be filed with the Bureau of Children's Services by a parent or other relative of such child, by a person or association or agency or public official having a special interest in such child or by the child himself, seeking that the Bureau of Children's Services accept and provide such care or custody of such child as the circumstances shall require. Such application shall be in writing and shall contain a statement of the relationship to or special interest in such child which justifies the filing of such application. The provisions of this section shall be



diciary construed such statutes for the protection of the unborn.<sup>64</sup> Minnesota, on the other hand, is a state in which the legislature has expressly included the unborn human within the definition of "person" for purposes of protection,<sup>65</sup> but that protection is for criminal offenses only and then too, if the unborn is "born alive."<sup>66</sup> The Minnesota Juvenile Court Act does not expressly include unborn persons.<sup>67</sup> Unless the legislature takes the initiative prompted by the current concern over abuse of children and subsequent fetal protection, even the prompting of the *Soto* court to use common law, will likely not result in judicial implementation of protection. Still again, medical technology may prompt judicial or legislative action. It has in New York.

In the 1985 New York *Matter of Smith*<sup>68</sup> case, the court was confronted with a typical issue concerning abuse and the rights of the unborn. That is, whether a finding that a child is neglected may be based solely on prenatal

deemed to include an application on behalf of an unborn child when the prospective mother is within the state at the time of application for such services . . . .

64. *Hoener v. Bertinato*, 67 N.J. Super. 517, 171 A.2d 140 (1980). A nine-month pregnant Jehovah's Witness female with RH negative blood was advised to obtain a blood transfusion to save the life of her unborn child. Without the transfusion the child probably would die soon after birth; if by chance it lived, the child would be physically or mentally deformed. The judge held that the parents neglected their unborn child when they refused to consent to the blood transfusion on religious grounds. In so conferring "personhood" upon the unborn human, the court said that "nothing in any of the statutory provisions. . . would preclude their application to an unborn child." *Id.* at 519, 171 A.2d at 144.

65. MINN. STAT. ANN. § 609.21 (West 1964):

Subdivision 3: Resulting in death to an unborn child-whoever causes the death of an unborn child as a result of operating a vehicle defined in § 169.01, subdivision 2, or an aircraft or watercraft

- (1) in a grossly negligent manner;
- (2) in a negligent manner while under the influence of alcohol, a controlled substance, or any combination of those elements; or
- (3) in a negligent manner while having an alcohol concentration of 0.10 or more, is guilty of criminal vehicular operation in death to an unborn child and may be sentenced to imprisonment for not more than 5 years or to payment of a fine of not more than \$10,000 or both. A prosecution for or conviction of a crime under this subdivision is not a bar to conviction of or punishment for any other crime, committed by the defendant as part of the same conduct.

Subdivision 4: Resulting in injury to unborn child-whoever causes great bodily harm as defined in § 609.02, subdivision 8, to an unborn child who is subsequently born alive, as a result of operating a vehicle as defined in § 169.01, subdivision 2, or an aircraft or watercraft . . . .

66. *State v. Soto*, 378 N.W.2d 625 (Minn. 1985). This case allows for the use of common law rules of construction in the interpretation of penal statutes whenever there is an ambiguity, thus allowing for judicial action. *Id.* at 627.

67. MINN. STAT. ANN. § 260.015 (West 1982). Subdivision 2, defines a child as a person under eighteen years of age.

68. 28 Misc.2d 976, 492 N.Y.S.2d 331 (1985).

conduct and whether the unborn child may be considered a person. These are the concerns that surround parent-child immunity, privacy, and since the New York statute did not provide expressly for the unborn, the issue of judicial activism.<sup>69</sup> The central issue concerned the definition of person and whether or not the judiciary would expand the definition to include the unborn when those same unborn are the victims of abuse. The judiciary did just that. Why? Again, medical science.

The *Smith* court noted that since medical science has advanced to such a degree that fetal treatment is available, coupled with the mother's documented chronic alcohol abuse, there was adequate proof to sufficiently establish an "imminent danger" of impairment of physical condition, including the possibility of fetal alcohol syndrome, thus constituting neglect within the meaning of the statute.<sup>70</sup> Thus, "personhood" was warranted for the unborn human as a result of medical advances and even though the legislature had not expressly provided for it. This was true, even when the unborn's status was seen within the context of *Roe v. Wade*.<sup>71</sup> This 1973 decision did not preclude the states from granting legal recognition to the unborn in non-Fourteenth Amendment situations.<sup>72</sup> The *Smith* case surely establishes—and recognizes—a trend to afford protection and thus personhood to the unborn even when there is no express legislative action. Partly this is due to medical advances, partly to the impetus of the abuse furry.<sup>73</sup>

The judicial, legislative and societal debate over fetal rights has many elements in common with the legal predicament of clergy abuse and reporting requirements. First, both are significantly affected by medical advances, the viability of the fetus and medical prognosis of future problems associated with child abuse are recent and now documented facts. Second, both con-

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69. N.Y. Fam. Ct. Act § 1012(e) (McKinney 1987), which reads in pertinent part: "an abused and/or neglected child is a person under eighteen years of age." Furthermore, the Act defines a child as "any person or persons alleged to have been abused or neglected." *Id.* at § 1012(b).

70. 28 Misc.2d at 979, 492 N.Y.S.2d at 334.

71. 410 U.S. 113 (1973) (specifically enumerating the privacy rights of the mother over her own body during pregnancy).

72. 28 Misc.2d at 979, 492 N.Y.S.2d 334.

73. For a very recent case, see *In re Ruiz*, 27 Ohio Misc. 2d 31, 500 N.E.2d 935 (1986). The court held that a heroin addicted mother who gave birth to a newborn suffering withdrawal symptoms abused her child within the meaning of the state statute on child abuse. *But see Reyes v. Superior Court*, 75 Cal. App. 3d 214, 141 Cal. Rptr. 912 (1977) (Cal. Court of Appeals dismissed the case against a pregnant woman addicted to heroin who later gave birth to twins addicted to heroin. The court relied upon legislative history to dismiss the criminal complaint of felony child endangering). *See also Justus v. Atchinson*, 19 Cal. 3d at 578-79, 565 P.2d at 131, 139 Cal. Rptr. at 106 (1977). (Indicating that the California judiciary is not willing to place a pregnant woman in the position of potential culpability for her prenatal conduct without the express mandate of the legislature.)

tain constitutional issues: the privacy rights of the mother and the free exercise rights of the cleric are yet to be completely resolved. Third, the mother that gives birth to the fetus and the cleric who confesses the child abuser, enjoy a special status entitling each to immunities and privileges as ancient as the common law. Fourth, as potential offender, the mother and the cleric each is subject to criminal and civil penalties that are recent in inauguration and piecemeal in application throughout the states. Each is subject to the current popular argument of judicial restraint or legislative prerogative. Fifth, at the center of fetal rights and the predicament of the clergy, is the increased public awareness of child abuse and the need to protect children. This last common element is perhaps the piston that shall drive the rest; child abuse is so much a part of the public consciousness, the public is demanding accountability and the public is ready for new responses.

## II. MEDICAL EVIDENCE

### *A. Medical Evidence Concerning the Children*

The revision of the reporting statutes facilitating the identification and prosecution of child sexual abusers is warranted and just. Child abuse is a public offense and deserves to be condemned.<sup>74</sup> But when the abuser, be that person male or female, reaches a certain point, he or she may seek out a place or a person for spiritual healing and reconciliation. This will not be the choice of action of all abusers, but it is and has been the choice of some. To whom does the abuser go for help? To whom would you go for help? One clinical article describes a man whose sexual orientation can be described as ego-dystonic, fixated, homosexual pedophilic. The man describes his feelings as the following:

What starts a person like myself doing what I do? Why me? Why can't I be normal like everybody else? You know, did God put this

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74. No argument can be made that child abusers should be exempt from prosecution because he or she is a cleric. Clerics such as those previously described, *see supra* notes 3 & 4, who abuse children are entitled to the same level of justice as any other offender. That is:

Persons who engage in dangerous or offensive sexual behaviors pose a variety of medicolegal problems, especially if juveniles or nonconsenting adults are involved. Some persons undoubtedly misuse other people with little concern for them and may require quarantine or punishment. Others (just as true of some drug addicts, cigarette smokers, or overeaters) may be in a sense victims of intense cravings that are quite resilient and therefore difficult, if not impossible, to resist. Such persons must still assume responsibility for their own actions, but when they seek medical help they should be treated with an appreciation for their difficulties rather than with stigmatization, scorn, or contempt.

Money, *Ideas and Ethics of Psychosexual Determinism*, 7 BRIT. J. SEXUAL MED., 27-32 (1979).

as a punishment or something towards me? I am ashamed. Why can't I just go out and have a good time with girls? I feel empty when a female is present. An older gay' person would turn me off. I have thought about suicide. I think after this long period of time, I have actually seen where I have an illness. It is getting uncontrollable to the point where I can't put up with it anymore. It is a sickness. I know it's a sickness. But as far as society is concerned, you are a criminal and should be punished. Even if I go to jail for twelve or fifteen years, or whatever, I am still going to be the same when I get out.<sup>75</sup>

Sometimes a person such as this will go to a cleric, a person offering spiritual assistance, because the abuser believes that the cleric will listen and cannot tell society. No, the abuser is not seeking a cure, and it is only in the most rare instances does the abuser expect a miracle. But the abuser expects to talk, to have someone listen and no matter what the reaction from the other side of the confessional screen, the abuser is now able to tell someone. And then for the cleric there is an opportunity that must be grasped and a reality that must be considered: here is a person who has abused one child or many and at this moment there is a chance to change the pattern and retrieve this person's life. This is reconciliation and it has secular and sacred connotations.<sup>76</sup>

Reconciliation, allowed to have an opportunity because of the confidentiality of the confessional and the sanctity of the priest-penitent privilege, allows the abuser a link with society that may begin a program of treatment. Indeed, this reconciliation is analogous to the immunity clauses added to the reporting statutes by many state legislatures.<sup>77</sup> As the immunity provision

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75. Berlin & Krout, *Pedophilia supra* note 7, at 157-58. HADEN, READINGS ON CHILD ABUSE, ITS PREVENTION AND TREATMENT (1986). (focusing on the need for treatment of the pedophile so as to help perpetrators inhibit unwanted pedophilic inclinations).

76. This combination of secular and sacred purpose is what separates the priest-penitent privilege from the doctor-patient privilege. Courts have been more willing to abrogate the doctor-patient privilege because, "the right of privacy was not absolute, and in some circumstances subordinate to the states' fundamental right to enact laws that promote public health, welfare, and safety, even though such laws might invade the offender's right of privacy." *People v. Younghanz*, 156 Cal. App. 3d 816, 202 Cal. Rptr. 910 (1984). See also *In re Brenda H.*, 119 N.H. 382, 402 A.2d 169 (1979) (superseded by statute in *Case v. Case*, 121 N.H. 647, 433 A.2d 1257 (1981)); *People v. Battaglia*, 156 Cal. App. 3d 1016, 203 Cal. Rptr 330 (1984). Thus, clerics, attorneys, and physicians face the same issue with regard to the abrogation of any privilege that would safeguard communications with a client. But because of specific constitutional guarantees (free exercise or due process), the cleric and the attorney are likely to sustain the privilege. See, e.g., Comment, *Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?*, 22 SAN DIEGO L. REV. 645 (1985).

77. See Saltzman, *Protection for the Child or the Parent? The Conflict Between the Federal Drug and Alcohol Abuse Confidentiality Requirements and the State Child Abuse and Neglect Reporting Laws*, S.I.U.L.J. 181 (1985).

is designed to facilitate reporting and lessen future abuse, so can we posit that the priest-penitent privilege allows confidentiality-immunity so as to lessen future abuse.

The difficulty with the analogy is that it is easier to prove the existence of immunity generated reports, but impossible to prove the efficacy of penitential privilege. Nonetheless, the value of the penitential privilege must rest upon the sincere secular and sacred objectives. Only when these objectives—penance, avoidance of the offense, participation in effective treatment, a sincere desire not to commit the offense again—are fostered and enforced, is there an effective answer to those who would abolish the privilege in light of the vast increase in child abuse. An emphasis upon these objectives, rather than upon the constitutional basis in free exercise, is a better approach to the state's actual or potential abrogation of the priest-penitent privilege; it responds to the public interest in lessening child abuse. Legislators should be convinced of the efficacy of the privilege, rather than forced into acceptance through constitutional law.<sup>78</sup>

The priest-penitent privilege has no public-secular purpose if the pedophile abuser cannot sustain treatment and be returned to society so as to make a contribution. Today, physicians such as Dr. Fred Berlin, think that treatment is possible. Thus, "[T]o the extent that treatment helps the pedophile gain better self control, both his interests and society's interests are served."<sup>79</sup> Since the privilege will assist in inviting treatment, all interests are served.

If the condition of pedophilia is irreversible, cannot be modified or controlled, then the argument can be made at a public-secular level that the pedophile should be identified through as broad a reporting net as possible, and then taken from the streets consistent with due process and incarcerated. Even while maintaining the strict spiritual and reconciling nature of sacramental confession no matter how abject the sinner, many clerics would be in agreement with the public purpose of protecting child and society and

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78. Society's interest in the priest-penitent privilege is at least equal to, if not greater than, the attorney-client privilege. Each has a basis in constitutional law (*see, e.g., In re Agosto*, 553 F. Supp. 1298, 1306-07 (D. Nev. 1983) emphasizing the client's due process rights), and each has a public purpose of seeking to promote privacy so as to bring about a fair trial for the attorney's client and a free exercise of religion for the priest's penitent. Nonetheless, some states have retained the attorney-client privilege and abrogated that of the priest penitent. *see, e.g. TEX. FAM. CODE ANN. § 34.04* (Vernon 1986) "... except in the case of communications between attorney and client." *See also In re Brenda*, 402 A.2d at 171 (stating the reporting statute did abrogate all privileges except the one for attorney-client). One state has abrogated all privileges. *See NEV. REV. STAT. § 432b.010* (1986) (requiring reports from every attorney who suspects child abuse and abrogates all other privileges).

79. BERLIN & KROUT, *supra* note 7, at 169.

suffer deep moral anguish over reporting penitent offenders.<sup>80</sup> But again, if medical technology does provide some form of treatment, then the mandatory incarceration argument lacks validity and the value of the privilege retains its secular and its sacred objectives.

Thus, does medical technology offer any guidance to the legislature considering the abrogation of the priest-penitent privilege? Is there treatment available which would support the necessity of the privilege as an inducement to child abusers to make a voluntary "confession" and halt any future abuse? The answer is yes, there is treatment, in sufficient amount to justify the privilege, but at present, there is no cure.<sup>81</sup> The emphasis of medical technology is upon "the educative and re-training aspects of therapy which involve the learning of new, wanted behaviours rather than the 'cure of an illness' ".<sup>82</sup> Thus, reports of a cure should be read with suspicion<sup>83</sup> and ef-

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80. It must be borne in mind that the persons to whom privilege is given must often want to report and break the privilege, thereby facing censure, but at the same time protecting children. Forcing the priest, attorney or physician to report does not take away the dilemma she or he faces.

"If the priest is among the group of those required or permitted to report and testify in cases of suspected child abuse, and if his suspicions of child abuse arise from a confidential communication, then he is faced with a legal and ethical dilemma of whether to report or to keep his confidence."

Note, *When Must a Priest Report Under a Child Abuse Reporting Statute?—Resolution to the Priests' Conflicting Duties*, 21 VAL. U.L. REV. 433 (1987). It is arguable that a deciding element in the legal and ethical decision will be the level of treatment available to the penitent/client/patient.

81. Even the medical treatment of castration of the male pedophile, either by surgery or injection of cyproterone acetate, is not an absolute cure. In one study in Denmark, there was a 30 year investigation of 900 castrated "sex offenders," many of whom were pedophiles. There were over 4,000 follow-up examinations and still there was a 3% recidivism rate. Studies done in Sweden, Holland (237 men with a 1.3% recidivism rate), and Switzerland (there was a 5.8% recidivism rate among 120 men following castration, with a 52% recidivism rate in the non-castrated control group) report comparable findings. Thus, even though the surgical and pharmacological methods of lowering testosterone seemed to be very effective, there was not positive cures for all. BERLIN & KROUT, *supra* note 7, at 165-66.

82. B. Taylor, *Perspectives on Pedophilia*, 84-85 (1981). Treatment has four principal objectives:

- (1) The establishment of rewarding adult sexual relationships (heterosexual or homosexual);
- (2) The improvement of sexual function within an existing adult sexual relationship (heterosexual or homosexual);
- (3) Increase in self-control over sexual behavior; and
- (4) Adjustment to the pedophilic role. *Id.* at 85. The fourth objective certainly is an approach which has many moral and ethical considerations, as the authors suggest: "A last consideration might be to recommend those whose motivation for change is minimal to move to an environment, e.g. parts of Morocco or Turkey, where legal and social constraints against non-coercive pedophilic practices are less extreme than in our own society. *Id.* at 91.

83. A recent headline in the *Arizona Republic* reads, "'Cured' Molester Admits 57 New

forts to provide therapy monitored for effectiveness. To date, proposed therapy treatments include psychotherapy, behavior therapy, surgery, and medications such as Medroxyprogesterone acetate (Depo-Provera), which reduces testosterone.<sup>84</sup>

Even while admitting that medical therapy is available and does in fact make a difference, those persons responsible for the more advanced research in the United States admit: "To our knowledge there have been no well-controlled clinical trials to demonstrate that any of the individual or group psychodynamic methods result in sustained behavioral change in these conditions (sexually deviant behaviors), and achieving into how they may have developed does not necessarily alter them. In point of fact, most of us have little understanding about why particular things arouse us sexually."<sup>85</sup> Certainly the pedophile is difficult to classify.<sup>86</sup>

A review of the clerics described at the beginning of this Article would decry any stereotype of a pedophile as a dirty, dangerous "old man" who attacks innocent young children in isolated spots, rapes them and then leaves the child in a permanent state of shock and damage. This is not the case and this is why so many instances of child abuse go unreported and the abuser untreated.

A more accurate description of a pedophile would contain elements of the following: First, the average age of a child molester is 35 years-old.<sup>87</sup> This would comport with the definition of researchers who define pedophilia as persons who are adults and simply find children to be appealing; there is no age designation. Also, "This condition for unknown reasons seems to occur

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Counts." This 42 year-old pedophile appeared on "60 Minutes" in 1978 to describe his cure of pedophilia. "During his trial in 1983 he was charged with 5 new counts of lewd and lascivious behavior with over a dozen boys." A. MAYER, *SEXUAL ABUSE: CAUSES, CONSEQUENCES AND TREATMENT OF INCESTUOUS & PEDOPHILIC ACTS* 23 (1985).

84. As this Article pertains to clerics, it should be noted that certain religious denominations would prohibit some or all of the different methods of treatment. Thus, the Roman Catholic Church would forbid castration and the fostering of alternate adult sexual relationships when the cleric is under a vow of celibacy. Even the taking of medications would be forbidden to some clerics.

85. Sexual Behavior and the Sex Hormones, *LANCET* 2:17-18, (1979); Gadpaille, WJ, *Cross-species and Cross-cultural contributions to Understanding Homosexual Activity*, 37 *ARCH. GEN. PSYCHIATRY* 349, 349-356 (1980); Berlin & Meinecke, *Treatment of Sex Offenders with Antiandrogenic Medication: Conceptualization, Review of Treatment Modalities, and Preliminary Findings*, 601 *AM. PSYCHIATRY A.* 600 (1981) [hereinafter Berlin & Meinecke].

86. See, e.g., Berlin, *supra* note 6, at 86-87.

87. Plummer, *Pedophilia: Constructing A Sociological Baseline*, in *ADULT SEXUAL INTEREST IN CHILDREN, PERSONALITY AND PSYCHOPATHY* 221 (1981). In a group called the Pedophile Information Exchange, 25 of their members were in the 20-29 age range, 28 were in the 30-39 range, 20 in the 40-49 range, 11 ranged from 50-59, seven in the 60 to 69 age range and one was over 69. *Id.*

almost exclusively in men."<sup>88</sup> Based on studies at the Sexual Behavior Clinic of the New York State Psychiatric Institute at Columbia-Presbyterian Medical Center in Manhattan, the victims of these pedophiles were defined as, "boys or girls age 13 or younger, with at least five years difference in age between the victim and the molester."<sup>89</sup> This demonstrates that the abuser is certainly younger than the stereotypical image.

Second, while most people would think that the pedophile is a stranger, studies show he is not. "The largest group of victimizers are caretakers—parents, baby sitters and those to whom we entrust children."<sup>90</sup> One of the most respected studies concerned females who had been approached sexually when they were less than 14 years-old by a male who was at least five years older than themselves. Almost half the males involved were relatives or acquaintances,<sup>91</sup> and the sexual activity (which is often mutual fondling and masturbation rather than intercourse) frequently occurs in the home of either the victim or the pedophile.<sup>92</sup>

A third stereotype is that the sex itself is forced on the child and is uncon-

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88. Berlin & Krout, *supra* note 7, at 2. See Berlin, *supra* note 6. "In terms of reported cases, pedophilia appears to be almost exclusively a male problem, although its exact prevalence is unknown. The majority of cases in the literature have involved heterosexual pedophilia (men attracted towards little girls), but more recently some centers have reported a higher frequency of homosexual involvements." Berlin, *supra* note 6, at 87. In reference to British crime statistics, one British article notes:

In 1976, only 40 women were found guilty of any sexual offenses (other than prostitution), and 10 of these were indecent assaults on females. Note, it is not technically even an offense for a woman to have sexual intercourse with a boy over 14—an indication of a bias within the criminal categories by which most crime is male-defined.

Plummer, *supra* note 87, at 245 n. 5. Professor Plummer also suggest a cultural bias that would make the male a pedophile and the woman maternal, nurturant and affectionate. He writes: "I suspect there is a considerable degree of adult female-child sexuality. Most of this, however, is hidden because of the expectations of the female role which simultaneously expect a degree of bodily contact between woman and child and deny the existence of sexuality in women." *Id.* at 228. Those who have seen the movie, "The Summer of '42" must wonder why the older woman was not immediately classified as a pedophile.

89. Collins, *Studies Find Sexual Abuse of Children is Widespread*, N.Y. Times, May 13, 1982, at C1, col.1.

90. *Id.* "Approximately one-third of all reported cases of child molestation are committed by strangers . . . . Another third of the cases involve acquaintances known to the child (a neighbor, friend of the family, or community leader) and one-third of the molestations are committed by primary relatives." *Id.* Distinctions should always be made between persons who engage in incestuous acts and those who are pedophiles. If the primary sexual orientation is towards children in general and not just towards his own offspring, the term pedophilia applies.

91. D.J. West, *Adult Sexual Interest in Children: Implications For Social Control*, in *SEXUAL INTEREST IN CHILDREN, PERSONALITY AND PSYCHOPATHY* 252 (1981); [hereinafter West, *Adult Sexual Interest in Children*]. See generally A.C. KINSEY, *SEXUAL BEHAVIOR IN THE HUMAN FEMALE* (1953).

92. Berlin, *supra* note 86, at 87.



trolled. This is not true. "Pedophilia occurs in part with the cooperation of the child either out of sexual curiosity or out of emotional need. It is comparatively rare that the sex act is forced on the child."<sup>93</sup> While this may seem to isolate the child from violence, the emotional trauma of the present and future is serious. For instance, at some point the child will "grow up" and the attention the child had received from the pedophile now diminishes as the erotic component dwindles. "This can, of course, bring acute problems to the child who may be startled or confused about this sudden change of erotic interest by the adult."<sup>94</sup> The future can bring additional problems, as researchers continually report, "certain types of early childhood experiences seem to play a contributory factor in determining adult sexual interests. Many pedophiles, for example, were themselves sexually involved with adults as youngsters."<sup>95</sup> A future consisting of continuing pedophilia should be considered a form of violence.

The fourth stereotype is similar in tone to the previous one and also conceals harm to the child. The stereotype is that the sex act itself is damaging and dangerous and may even lead to such things as child murder. As has been discussed earlier, violence is extremely rare between a pedophile and a child.<sup>96</sup> Since pedophiles are more likely to "seduce children with loving attention, physical affection, verbal praise and a wide variety of other re-

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93. Plummer, *supra* note 87, at 225. A distinction must be made between child rape and pedophilia. The former consists of incidents such as the killings in Atlanta, Georgia, during 1980 and 1981, or the brutal rape and murder of a two-and-one-half year old girl by a sadistic molester of children (called mysopod). The girl's grandmother eventually began a program called S.L.A.M. (Society's League Against Molesters). Perhaps such brutality is becoming more common, as written in the N.Y. Times: "[a] recent study of police and emergency-room records of child molestation by Dr. William Marshall and his colleagues at Queens University in Kingston, Ontario, reported that 40% of the cases of sexual abuse of children involved force or violent acts." Collins, *supra* note 89 at C1, col. 1. In the United States, the National Center for the Prevention and Treatment of Child Abuse and Neglect reports an increase in the sexual mistreatment of children. *Id.* Yet, a study in Detroit, Michigan, of over 1,252 sex offenses against children found that physical injury occurred in less than nine percent of the cases. Berlin, *supra* note 86, at 87.

94. Plummer, *supra* note 87, at 236. Surely not all pedophiles would reject or abandon a relationship with a child upon maturation but, just as in any other relationship, the ardor may wane and the child will be less able to deal with it than an adult.

95. Berlin, *supra* note 86, at 88; D. Crawford, *Treatment Approaches with Pedophiles* 22 PERSONALITY & PSYCHOPATHY 209 (1981) (author quotes others as suggesting that adolescent problems of heterosexual adjustment may facilitate the development of pedophilic interests); Berlin & Meinecke, *supra* note 85, at 606. (Data presented in the report suggest that non-learned biological as well as learned environmental factors may play an etiological role in the development of sexually deviant behaviors); BERLIN & KROUT, *supra* note 7 at 159. ("Many men who experience pedophilic erotic urges as adults were sexually involved with adults when they were children").

96. See *supra* note 91.

wards,"<sup>97</sup> instances of rape or sexual violence are rare. But again, even though there are few instances, there are some and if the researchers are correct, pedophiles tend to produce others and so on. Thus, the potential for a form of violence is there.

But an important point must be made. Because a person is a pedophile does not mean that this same person, "is lacking in conscience, diminished in intellectual capabilities, or somehow 'characterologically flawed.'" <sup>98</sup> The pedophile will have character, intellect, temperament, and other mental capacities, and it is incorrect to assume that because a person is a pedophile he will be violent, or homosexual, or any other stereotype.<sup>99</sup>

Those who think that the child is uninvolved in the activity are guilty of the fifth stereotype associated with pedophilia. Even though the child does not precipitate the act in the same sexual way associated with adult sexuality, children do engage in affection-seeking behavior and thus it is wrong to suggest that the child is totally passive.<sup>100</sup> It is plausible to estimate that many children who find themselves in institution care, or under the supervision of repeated "strangers" will act in ways which can establish relationships with adults.<sup>101</sup> If children cannot achieve a sufficient level of emotional response from one parent, the child may resort to activities which will facilitate pedophilia. Thus, the changing American family can well be a reason why there is an increase in child abuse,<sup>102</sup> placed in a stress-filled home envi-

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97. ADELEMAYER, *SEXUAL ABUSE: CAUSES, CONSEQUENCES AND TREATMENT OF INCESTUOUS & PEDOPHILIC ACTS* 20 (1985).

98. BERLIN & KROUT, *supra* note 7, at 161.

99. *Id.* "Men with unconventional sexual orientations such as pedophilia can manifest a range of character traits, just as is true of persons with conventional heterosexual orientations." Berlin, *supra* note 86, at 90. Thus, a pedophile who has been consistently non-violent in temperament would not ordinarily be expected to undergo a sudden change in personality so as to become a physical danger to others. *Id.*

100. Plummer, *supra* note 87, at 226. While each child will differ in needs and temperament, it is the general consensus that, since "sexual activity by pedophiles with children rarely involves physical assaultiveness and is usually the result of persuasion rather than coercion," the child must be responding in some way. Berlin, *supra* note 6, at 87.

101. Plummer, *supra* note 87, at 226. The change in the American family has produced many children who now will grow up in a one-parent household. While such an arrangement does not automatically mean that a child will suffer emotional deprivation, it does suggest that it will be more difficult for a child to develop sustained relationships that can provide the level of emotional response needed.

102. One indication of the changing nature of American family structure is found in KOZOL, *RACHEL AND HER CHILDREN* 14-15 (1988). Writing about the growing homeless population in New York City, the author writes:

New York is spending, in 1987, \$247 Million to provide emergency shelter to its homeless population. Of this sum, about \$150 million is assigned to homeless families with children. Nonetheless, the growth in numbers of the dispossessed far outpaces city allocations. Nine hundred families were given shelter in New York on any

ronment, children will seek emotional response. Furthermore, many of these children will grow up in households that are poor, an additional burden.

If modern trends continue, not only poverty will increase in American children, but child abuse predicated upon unmet needs of the children themselves. It has been estimated that sixty percent of the children born in 1984 will live in a one-parent family before they are eighteen. Females will head ninety percent of these one-parent households. For the same year, 7.3 million families were classified as poor, 3.8 million of these were single-parent.<sup>103</sup> The catastrophic assessments of persons such as Senator Daniel Patrick Moynihan contribute to more than the decline of the American family. They predict the rise of incidents of child abuse as children become financially *and* emotionally destitute. Children will become less passive, inviting more abuse.

The sixth stereotype concerning pedophilia suggests that the consequences to the child are devastating. This may be the case with non-consensual activity. The most common response was one of simple fright.<sup>104</sup> In one British study quoted by Dr. Kenneth Plummer, it was reported:

By far the greatest potential damage to the child's personality is caused by society and the victim's parents, as the result of (1) the need to use the victim to prosecute the offender, and (2) the need of parents to prove to themselves, family, neighborhood and society that the victim was free of voluntary participation and that they were not failures as parents.<sup>105</sup>

Other researchers suggest more lasting consequences. Dr. West, in another British report, writes:

Children can be pressed into continued erotic practices that they do not really want because they fear to displease, or to be rejected, or because they cannot bring themselves to give up the rewards of compliance. They may come to feel guilty, perhaps because of the sordid or secretive circumstances of the affair, or from fear of the consequences of detection. This may in turn interfere with the development of relationships with peers.<sup>106</sup>

And in studies done in the United States, "many men who experienced

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given night in 1978; 2,900 by 1984; 4,000 by the end of 1985; 5,000 by the spring of 1987. The city believes the number will exceed 6,000 by the summer of 1988 . . . . By 1990, the actual homeless, added to the swelling numbers of the hidden homeless, will exceed 400,000 in New York.

103. MOYNIHAN, *FAMILY AND NATION* 48 (1986).

104. Plummer, *supra* note 87, at 226-27.

105. *Id.*

106. West, *supra* note 91, at 255. In essence, Dr. West agrees with the other studies done in Great Britain.

pedophilic erotic urges as adults were sexually involved with adults when they were children."<sup>107</sup> Any orientation to pedophilia cannot be taken lightly. As Dr. Berlin writes: "Living in a world where all those who are sexually appealing are forbidden as partners must be difficult—a situation heterosexual adults can, perhaps, empathize with by imagining living in a world where one was expected to have sex only with children."<sup>108</sup>

Thus, there are consequences to the child, although immediate violence or trauma is rare. More likely would be feelings of fright, guilt, loss of peer development and a definite possibility of eventual development of pedophilic tendencies. But those who suggest that an early homosexual relationship between child and adult will dispose that child to an adult homosexual orientation, have little evidence to support that claim.<sup>109</sup> "In most cases, factors present long before the pedophiliac incidents seem to be the main determinants of receptiveness or resistance to heterosexual inducements."<sup>110</sup>

### B. Medical Evidence Concerning the Pedophile

"People do not decide voluntarily what will arouse them sexually. Rather, they discover within themselves what sorts of persons and activities are appealing to them."<sup>111</sup> When we defined a pedophile, we said he (or she) experiences absolutely no erotic attraction whatsoever towards adults, but has a great deal of difficulty resisting the sexual temptations that he (or she) experiences towards children.<sup>112</sup> He is not a person with a raincoat and over the age of seventy, rather, he is probably a mature unmarried male over the age of eighteen who relates well to children and was sexually involved himself with an adult when he was a child. But remember: "Despite the high risk profile, . . . pedophiles can be of any age, married or single, bisexual, homosexual, or heterosexual. They work in such varied occupations as laborer, social worker, physician, computer sales manager, bank official—any

107. Berlin & Krout, *supra* note 7, at 159. See Berlin, *supra* note 6, at 88: "many pedophiles . . . were themselves sexually involved with adults as youngsters."

108. Berlin *supra* note 6, at 89.

109. Plummer, *supra* note 87, at 227.

110. West, *supra* note 91, at 256.

111. Berlin, *supra* note 6, at 89.

112. This person would be defined as a fixated pedophile. A. Nicholas Groth, leading author of *MEN WHO RAPE: THE PSYCHOLOGY OF THE OFFENDER*, believes there are two categories of pedophiles: fixated and regressed. "The regressed pedophile tends to revert to an early mode of (fantasized) behavior, satisfaction and/or gratification when he is under stress. Because his behavior is neither habitual nor compulsive, he tends to be more amenable to therapeutic interventions." *MAYER, SEXUAL ABUSE: CAUSES, CONSEQUENCES AND TREATMENT OF INCESTUOUS & PEDOPHILIC ACTS*, at 23 (1985). Persons who form a very small minority of pedophiles and are characterized by sadism or murder, are distinct yet often attracted to children. This behavior is referred to as mysopedic. *Id.* at 24.

job that can be named."<sup>113</sup>

How does it happen? Is there a choice involved? There is definite evidence that those who are pedophiles have at some time been victims; and one researcher has proposed that, "excessive prohibition of early sexual expression may also put one at risk of developing pedophilic sexual desires."<sup>114</sup> Other studies suggest that pedophilia does in fact occur more frequently in some families than others. Then too, biology may have an influence: "Although it appears that specific sexual tastes or preferences may sometimes be modified by virtue of early life experiences, the phenomenon of sexual desires itself is apparently unlearned and rooted in biology."<sup>115</sup> Thus, summarizing possible causes, it is useful to note that at the Johns Hopkins Hospital Sexual Disorders Clinic, it is unusual to see a man who experiences recurrent pedophilic cravings in the absence of one of the following: (1) a significant biological abnormality, (2) a past history of sexual involvement with an adult during childhood, or (3) both.<sup>116</sup>

Once the general nature of the pedophile has been identified, the possibility of treatment can be suggested. But since the cause or the exact "etiology of erotic desires and fantasies that influence conventional heterosexual behavior, as well as knowledge about what makes a stimulus sexually appealing, is also poorly understood,"<sup>117</sup> treatment of deviant sexual desires is really a modification of the character traits of the individual experiencing them. Treatment is directed more towards what the pedophile does than what makes him or her do it exactly. The treatment, whatever form it should take, has never been demonstrated to be 100 percent effective as a "cure." This is true, even when the male pedophile has been castrated, although this harsh treatment reports a very low rate of recidivism. At the other extreme is punishment such as incarceration in prison. "The recidivism rate is extremely high when punishment is the treatment of choice, as punishment

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113. MAYER, *supra* note 112, at 25.

114. Berlin & Krout, *supra* note 7, at 159.

115. *Id.* at 160:

"Following statistical analysis, Berlin (1983) concluded, as have others, that there may, indeed, be an association between the presence of certain kinds of biological abnormalities and the presence of unconventional kinds of sexual interests such as pedophilia." *Id.* See Berlin & Meinecke, *supra* note 85, at 606: "At a symposium at the Mass. Inst. of Technology, Goy and McEwen reviewed evidence suggesting that nonlearned biological factors may be more important determinants of human sexual behavior than is generally appreciated. Improved understanding of possible genetic, hormonal, or neurochemical bases for human sexual pathology should be sought in pursuing further the rationale for treatment with medication."

SEXUAL DIFFERENTIATION OF THE BRAIN (Goy, McEwen ed. 1977).

116. *Id.* at 160-61.

117. Berlin & Meinecke, *supra* note 85, at 601.

does virtually nothing to make it any easier for a man to resist deviant sexual cravings."<sup>118</sup>

Treatment of the pedophile is important to the legal discussion regarding the reporting statutes because there is implicit in both the secular as well as the sacred purposes of the priest-penitent privilege the necessity for change, reconciliation, a cessation of pedophile conduct. While some of the medical treatments will be rejected for theological reasons by persons entitled to use the privilege, others parallel the secular and spiritual purposes of reconciliation. Thus, if the priest-minister-rabbi-spiritual director is to utilize a secular purpose underlining a privilege from reporting known or suspected child abuse reported in confession, that person claiming the privilege should be schooled in the modern medical approaches to therapy and treatment. This responsibility must be accepted by the religious denominations.

Dr. Fred S. Berlin, reports that there are four major modalities for treating pedophilia: (1) psychotherapy, (2) behavior therapy, (3) surgery, and (4) medication.<sup>119</sup> No matter the mode, treatment is necessary and important to society and the religious perspectives asserting the priest-penitent privilege. In an effort to maintain a personal dignity suggested by authors and researchers such as Dr. Berlin,<sup>120</sup> the privilege can be an opportunity for change and cessation of criminal conduct. Again, this is beneficial to society as a whole as, "treatment undertaken on the individual's own voluntary initiative is easier and better than treatment forced later on as a result of some social crisis."<sup>121</sup> Amazingly, one British researcher suggests advertising confidential "walk-in" counselling services as a means through which this

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118. Berlin, *supra* note 6, at 92. See, West, *supra* note 91, at 262: "[T]he criminal justice system . . . [has] little relevance to the psychological situations underlying pedophilic behavior." *Id.*

119. Berlin & Krout, *supra* note 7, at 163. Within each of these modalities are individual variations and suggestions for newer and more modern treatments. For a detailed description of modern treatment approaches, contact should be made with the Sexual Disorders Clinic, Meyer 101, The Johns Hopkins Hospital, 600 North Wolfe Street, Baltimore, Md. 21205.

120. Dr. Berlin likes to combine the religious values of the Bible with the need for secular treatment within society. He writes:

Almost two thousand years ago as an outraged crowd attempted to stone to death a woman whose sexual behavior they considered offensive, one man stepped forward to stop the retribution, speaking against such revenge while espousing values such as compassion, understanding, forgiveness, and reformation. He asked that persons be judged not simply by their behavior but with some appreciation for their humanity. Perhaps that message still goes unheeded today when it comes to the issue of how we deal with some of those who have sexual and affectional orientations of a sort that frighten us, and that differ from our own.

BERLIN & KROUT, *supra* note 7, at 11-12.

121. West, *supra* note 91, at 263.

treatment may begin.<sup>122</sup> The priest-penitent privilege provides this today; the rationale suggests extending the privilege to physicians working in a psychotherapy role.<sup>123</sup>

In regards to treatment, all researches would agree that "[m]en with pedophilic and related sexual problems who want to change their habits need treatment centres where all relevant techniques can be applied, from social skills training to psychoanalysis, from orgasmic reconditioning to hormonal medication."<sup>124</sup> Some researchers would say that the best time to start treatment is in youth or early adulthood, when failure to develop sexual relationships with persons of a suitable age first becomes a noticeable problem.<sup>125</sup> The purpose of all treatment is to help "a person stop rationalizing, as well as helping him to develop strategies for more successfully resisting sexual and affectional temptations."<sup>126</sup>

If, as a result of privileged communications, the cleric is able to recommend treatment to the penitent pedophile, what are the particulars of each of the modalities listed by Dr. Berlin?<sup>127</sup>

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122. *Id.* This point emphasizes the present day insistence on "prevention rather than cure." Researchers suggest that adolescent problems of heterosexual adjustment may facilitate the development of pedophilic interests and that more resources such as sex education and anonymous counseling could contribute to prevention. See, e.g., CRAWFORD, PERSONALITY AND PSYCHOPATHOLOGY, 181-211 (1981).

123. Even though physicians were among the first to lose any privilege associated with the reporting statutes, those physicians serving in a capacity as psychotherapists face a similar dilemma as priests when they are directed to report confidential communications. See Comment, *Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?* 22 SAN DIEGO L. REV. 645 (1985).

124. West, *supra* note 91, at 263.

125. While specific treatment for pedophilia may include the development of alternate (and legal) sexual partners, this is one of the treatments which many religious denominations will find offensive. Nonetheless, it has been suggested that easier access to adult sex or a more developed adult sexual identity would be a preventive measure and a form of treatment. West, *supra* note 91, at 264. See, MARKS, REVIEW OF BEHAVIORAL PSYCHOTHERAPY, II: SEXUAL DISORDERS, 138 AM. J. PSYCHOLOGY 750-56 (1981), for a study of sexual dysfunction and a behavior approach to developing more socially acceptable sexual conduct. Obviously, such treatment would not be suitable for celibate clergy.

126. Berlin & Krout, *supra* note 7, at 168.

127. It is important to note that no suggestion is made that the cleric assume the role of counselor to the pedophile. The protection of the privilege for the cleric lies in the fact that the cleric serves in a spiritual capacity with entry-level benefits for society and reconciling effects for the spiritual welfare of the pedophile. Elements of civil negligence and also criminal reporting mandates will penalize the cleric who assumes the role of a professional therapist or the singular role of psychotherapist. See Flemming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CAL. L. REV. 1025 (1974); Note, *Tort Law—The Psychiatric Duty to Warn*; *Cairl v. State*, 6 HAMLINE L. REV. 513 (1983); Note, *Psychotherapists and the Duty to Warn: An Attempt at Clarification*, 19 NEW ENG. L. REV. 597 (1984). See also for negligence on the part of clergy and civil consequences, *Nally v. Grace Community Church*, 157 Cal. App.3d 912, 204 Cal. Rptr. 303 (1984) (religious counseling: parents allowed to pursue suit

### (1) Psychotherapy

Since medical science still does not know exactly what controls the sexual orientation of a person, it is difficult to modify behavior that society would regard as undesirable. Nonetheless, when a pedophile is placed in a psychotherapy program of treatment, he is involved in a program that utilizes the process of introspection to try to identify what went wrong with the expectation that newly acquired insights will then facilitate the problem being rectified. This is a process that has ancient roots; it is probably the first form of treatment encountered by pedophiles prior to the establishment of today's modern treatment centers.

Today, "the most widely used treatment for pedophiles is probably group psychotherapy."<sup>128</sup> But "it is doubtful that individuals can come to understand the basis of their own sexual interests through the process of introspection alone."<sup>129</sup> Researchers are concerned over the expense and lengthy process of psychotherapy and conclude that, "psychoanalysis and individual psychotherapy used alone appear to be of little value in the treatment of pedophiles, and group therapy has still to demonstrate clearly its effectiveness."<sup>130</sup>

Treatment within the context of the traditional definition of psychotherapy does not offer a panacea for pedophiles or society. Indeed, even when used in a comprehensive form of treatment, utilizing the other modalities identified by Dr. Berlin, there is no cure for pedophilia. The value of psychotherapy lies in its history and its use with other modes of response.

### (2) Behavior Therapy

Unlike psychotherapy which was concerned with identifying the historical antecedents of pedophilia within persons, behavior therapy attempts to extinguish erotic feelings associated with children, while simultaneously teaching an individual to become sexually aroused by formerly non-arousing age-appropriate partners. Needless to say, this form of therapy will have consequences within the context of clergy, be the cleric the offender or the referral

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against church and clergy for son's suicide); Comment, *Made Out of Whole Cloth? A Constitutional Analysis of the Clergy Malpractice Concept*, 19 CAL. W. L. REV. 507 (1983).

128. CRAWFORD, *supra* note 122, at 190. None of the researchers are comfortable with psychotherapy alone as a form of treatment. Rather, each would favor a "comprehensive" program of treatment from which the therapist can utilize many forms of treatment to modify the behavior of the patient. Medical progress is being made each day, controlled clinical studies are being evaluated, and the effects of long term treatment are being studied.

129. BERLIN & KROUT, *supra* note 7, at 163.

130. CRAWFORD, *supra* note 122, at 190. Psychotherapy is used in the context of comprehensive treatment and the results there are better appreciated by researchers. *Id.* at 191.



agent within the spiritual confines of confession. Since most religious denominations have specific creeds or revelatory documents forbidding sexual relations outside marriage, and some denominations mandate a celibate clergy, any type of behavior that seeks to "stimulate" sexual activity will affect the clerical predicament. In addition, as behavior modification can include chemical or electrical stimulation, religious denominations may find themselves recommending medical practices forbidden on ethical or religious principles. Eventually, for the religious superior as well as the priest in the priest-penitent context, the choice may seem as the lesser of two evils or, does the end justify any means?

There is not a great deal of information from controlled studies regarding behavior modification and pedophilia *per se*. Most work has been directed towards homosexuality. Nonetheless, the basic objectives will be, as described by a British report,<sup>131</sup> the following:

- (1) The establishment of rewarding adult sexual relationships (heterosexual or homosexual);
- (2) The improvement of sexual function within an existing adult sexual relationship (heterosexual or homosexual);
- (3) Increase in self-control over sexual behavior; and
- (4) Adjustment to the pedophilic role.

While obtaining these objectives, the emphasis is upon the educative and re-training aspects of therapy which involve the learning of new, wanted behaviors, rather than the "cure" of an illness. Note that there is no emphasis upon punishment, as this is found to be the least effective treatment for pedophilia.<sup>132</sup>

There are specific behavior approaches. The earliest is aversion therapy with its utilization of drug induced nausea or electrical shock, now used almost exclusively. While such methods have advantages over both castration and more lasting drug treatments, it has ethical difficulties for some

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131. PERSPECTIVES ON PAEDOPHILIA 85 (B. Taylor ed. 1981) [hereinafter PERSPECTIVES ON PAEDOPHILIA].

132. Incarceration takes the pedophile out of society but this does nothing to change the nature of the sexual orientation or increase the pedophile's ability to resist the compulsion. Even though control and removal of the pedophile is important, researchers emphasize treatment. See BERLIN & KROUT, *supra* note 7, at 164. See also West, *supra* note 91, at 262.

But the criminal justice system is a crude, sometimes inhumane and often ineffectual instrument. It can only deal with the probably untypical minority brought to its attention, its methods are essentially repressive rather than remedial and its decisions are governed by a tariff of punishments that have little relevance to the psychological situations underlying pedophilic behavior.

See also Berlin, *supra* note 6, at 92: "The recidivism rate is extremely high when punishment is the treatment" of choice, as punishment does virtually nothing to make it any easier for a man to resist deviant sexual cravings."

therapists, does nothing to identify the causes of pedophilia and there are no studies that demonstrate long term improvement of the pedophile. In essence, this is a negative form of behavior modification.

A more positive form of therapy is assertiveness training. This training relates to the finding that "[A] proportion of pedophiliac acts represent substitute gratifications sought by men frustrated in their desire for an adult partner."<sup>133</sup> Studies done say that training the pedophile to become more assertive enables him to cope with adult relationships and thus eliminates the need to seek out children.<sup>134</sup> It is difficult to imagine this type of treatment as offensive to most of the religious denominations, yet there will be difficulty in establishing alternative sexual gratification if the offending pedophile is a cleric and the religious denomination mandates celibacy.

Clerical pedophiles who are operative in a celibate denomination and wish to remain there will have difficulty with many of the more modern behavioural approaches. Also, inasmuch as some of the newer approaches emphasize alternate non-deviant sexual arousal, if it occurs outside of marriage, many more religious denominations will have difficulties with offending clerics *and* recommending such techniques to penitents. Difficult choices will arise in the context of the priest-penitent privilege and its secular and ecclesiastical purposes of change and reconciliation.

Some of the alternate non-deviant sexual arousal techniques now being tested as part of a comprehensive program of treatment would include: (1) fantasy modification, (2) exposure to explicit stimuli, (3) classical conditioning, (4) shaping and fading operant conditioning, (5) biofeedback and (6) systematic desensitization of anxiety. These all emphasize the increase of sexual arousal; the decrease of sexual arousal has been attempted through covert sensitization, biofeedback and masturbatory satiation. These latter techniques may be a bit more acceptable within the context of clergy and religious doctrine.<sup>135</sup> And since these activities have the effect of enticing the pedophile to change, they counteract the effect that the use of drugs has in encouraging the patient to see himself in a passive role dependent on the

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133. West, *supra* note 91, at 264. Assertiveness training should be seen in the context of re-education and skills training of which more will be written later.

134. CRAWFORD, *supra* note 122, at 194. There is some success reported by Dr. Crawford: "Stevenson and Wolpe (1960) report three single-case studies, one of whom was a pedophile, given assertiveness training. Treatment lasted for 45 sessions and on a six and one-half year follow-up there had been no recurrence of deviant sexual behavior." Furthermore, "[A] more recent single-case study on a pedophile (Edwards, 1972) reports similar success with only 13 treatment sessions of assertiveness training." *Id.*

135. For a complete description of all these techniques, see CRAWFORD, *supra* note 122, at 195-202. See generally, MARKS, *supra* note 125 for a particular review of programs seeking to utilize behavior modification within the context of couples, even spouses.

therapist for the solution to his problems.<sup>136</sup>

In regard to the predicament of clergy—as offenders and as spiritual advisors—behavior modification brought about through skills training is more acceptable than sexual techniques. Even though data suggests that nonlearned biological factors contribute to sexually deviant behavior,<sup>137</sup> sexually dysfunctional persons who have social skills defects can be taught to meet people and set limits on their behavior. While certainly not true of all pedophiles, many have difficulty in maintaining relationships, communications, expression of feelings, role conflicts, and coping with anger.<sup>138</sup> Perhaps many more would admit to feeling a stigmatism from early sexual victimization forcing them into guilt and a sub-cultural mentality that affected healthy and productive relationships.<sup>139</sup> Social and skills training is the means through which the pedophile seeks to develop a better approach to life: social interaction, the ability to express emotions, cope with job interviews, aggressive confrontations and personal problem solving.<sup>140</sup>

Individual and group therapy programs address these social skills to be developed by persons with deviant sexual behaviors. The sessions will include gender role behavior, sex education and self control, with the least known about the potential of self-control procedures as applied to sex offenders.<sup>141</sup> This should change in the future as all treatment programs include such therapy as part of a comprehensive approach. There is now sufficient evidence that social skills should be a central part of any sexual reorientation program; some programs report that “social skills training has been found to be the most useful of all the treatment techniques employed

136. PERSPECTIVES ON PAEDOPHILIA, *supra* note 131, at 91.

137. Berlin & Meinecke, *supra* note 85, at 6. At a symposium at the Massachusetts Institute of Technology, evidence was presented suggesting that “nonlearned biological factors may be more important determinants of human sexual behavior than is generally appreciated.” *Id.* Such evidence has significant impact upon punishment and hormonal treatment programs which offer evidence of “marked reductions in sexually deviant activity and fantasy” in patients. *Id.* at 7. The hormonal treatment program consisted of medroxy-progesterone acetate discussed *infra* at 1935-37.

138. PERSPECTIVES ON PAEDOPHILIA, *supra* note 131, at 87. The author suggests further readings and studies commenting on skills training and how this will affect pedophilic behavior.

139. For an explanation of this argument, see Plummer, *supra* note 87, at 234-35.

140. CRAWFORD, *supra* note 122, at 202.

141. While this form of behavior therapy would be most acceptable to many religious denominations, one author admits that, “[t]he potential of self-control procedures with sex offenders has not been fully explored and seems worthy of greater recognition.” *Id.* at 205. Procedures used in self control training include self-monitoring, self evaluation, self-reinforcement, intention, statements and interpersonal contracting, but again, “little attention has been given to the application of self-control techniques with sexual offenders.” *Id.* at 204.

and the most frequently used."<sup>142</sup>

### (3) *Surgery*

Defined succinctly, surgery as applied to pedophiles would include removal of the testes (castration) so as to lower testosterone and thus decrease the intensity of sexual cravings, which are directed towards children. "In animals, lowering testosterone by means of removing the testes usually eventually leads to cessation of virtually all sexually motivated behavior, although sometimes this may take as long as two years to occur."<sup>143</sup> Similar results are available in regard to humans. Thus, the surgical method of lowering testosterone has been shown through at least one study—done in Switzerland—to enable many men to better control sexual appetite and still allow them to perform sexually following castration.<sup>144</sup> This method of treatment also has the lowest level of recidivism and does not rely upon the initiative of the pedophile to maintain a pharmacological schedule.

This method of treatment would be rejected immediately by many religious denominations and various civil authorities as well. "Forced castration is clearly not acceptable as treatment in this country but has met with some success elsewhere."<sup>145</sup> In the United States, Constitutional protections of privacy, due process, equal protection and cruel and inhuman punishment would prohibit such treatment. Indeed, even in Germany, Switzerland, Norway and Denmark studies conclude "that there is no scientific or ethical basis for castration in the treatment of sex offenders, and it is stated that consent to castration, based on the free decision of an inmate, may be a legal fiction in some European countries." The choice, it is claimed, is 'between two evils; loss of manliness—loss of freedom through long-term imprisonment.' "<sup>146</sup> Even voluntary castration would be offensive to many religious

142. *Id.* at 207.

143. BERLIN & KROUT, *supra* note 7, at 165. Neurosurgery as a means of decreasing sexual appetite is still under investigation. There are discussions available concerning its rationale. In a German study, surgeons operated on a hypersexual male who had been sentenced to a prison term for molesting children, a heterosexual rapist and three homosexuals. "The two hypersexual males had marked diminution of their sex drives immediately after the procedure but in one the sex drive returned within six months of the operation; the homosexuals reported complete loss of all homosexuality. Reported side-effects were few (no metabolic, hormonal or visual disturbances) and of the five, two had long-lasting, positive side effects: substantial reduction in the psychopathy and increased insight into their behavior." PERSPECTIVES ON PAEDOPHILIA, *supra* note 131, at 90.

144. See BERLIN & KROUT, *supra* note 7 at 166.

145. Berlin & Meinecke, *supra* note 85, at 3. The success to which they refer is such studies as done in Switzerland.

146. PERSPECTIVES ON PAEDOPHILIA, *supra* note 131, at 89.

denominations; and for everyone, even the pedophile himself, there are ethical considerations.

#### (4) Medication

While the reduction of testosterone levels through castration was seen to be effective in reducing sexual deviant behavior, it was also questionable from the moral and ethical perspectives. Today there is a pharmacological medication that can be injected intramuscularly once per week with similar results. The medication is called medroxyprogesterone acetate (MPA). The effect is the same as castration: a reduction in the circulating levels of the male sex hormone, testosterone.<sup>147</sup> But with MPA there are no permanent effects; MPA use evidences mild lethargy, cold sweats, nightmares, hot flashes and muscle aches. Even with these symptoms, any "effects appear to be fully reversible within a few months after the medication is stopped."<sup>148</sup> Researchers conclude that MPA is the most useful drug available for controlling sexual behavior, particularly because of its lack of side-effects.<sup>149</sup>

While there is a level of satisfaction with medications such as MPA, the drug is not a cure and it should not be seen as such.<sup>150</sup> Indeed, any long term effects of MPA have not been seen and there are some countries, such as Australia, where the use of MPA has been banned because of the ethical difficulty of simply "controlling" persons rather than "curing" them.<sup>151</sup> Re-

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147. This is not the first drug with which treatment centers have experimented. There have been others, such as butyryphenone, benperidol with chlorpromazine and placebos. None were seen as effective. See e.g., PERSPECTIVES ON PAEDOPHILIA, *supra* note 131, at 90-91. Dr. David A. Crawford also discusses the use of drugs such as oestrogen and benperidol. See CRAWFORD, *supra* note 122, at 185-87.

148. Berlin & Meinecke, *supra* note 85, at 3. It is the permanence as well as the cruelty that will affect the religious and the secular toleration of any medication.

149. CRAWFORD, *supra* note 122, at 187. See BERLIN & KROUT, *supra* note 7, at 166-67. The drug, which is not feminizing, may cause an increased incidence of breast cancer in female beagle dogs, and of uterine cancer in monkeys. It has been used in over eighty countries of the world as a female contraceptive, supported in its use for this purpose by the World Health Organization. No studies showing an increased risk of cancer in males (either humans or animals) have been reported.

150. There is a high level of success with the drug from the perspective of recidivism. As an example, "[o]f more than 70 men treated at The Johns Hopkins Clinic with MPA over the past three years for some form of paraphilia (mostly pedophilia and exhibitionism), less than ten percent have relapsed." BERLIN & KROUT, *supra* note 7, at 167. Again, this is not a cure and the small percentage of recidivists would be problematical to a religious superior seeking to assign a pedophile or to a religious counselor anguishing over possible further abuse to children.

151. Dr. Berlin addresses the concern of some critics of MPA when they say that the drug is "mind controlling" and thus ethically improper. He favors the use of the drug since it confers upon persons the opportunity for increased self-control. *Id.* Also, "[t]he legitimate medical indications for use of psychotropic drugs are (a) to decrease suffering (as in the case of

searchers also caution that the dosage must be carefully monitored so that some sexual activity is possible and non-deviant sexual desires fostered. There is additional concern over the problem of ensuring that the patient continues to take the drug. This is not a consideration with castration.<sup>152</sup> Also, if the patient does not appreciate the proper use of the drug, the patient could assume a passive role, dependent on the therapist for a solution to the much greater problem.<sup>153</sup> Caution should surround the drug.

As we have seen, there are at present four major modalities of treatment for pedophilia: (1) psychotherapy, (2) behavior therapy, (3) surgery, and (4) medication. Of import for the cleric offender, as well as the cleric spiritual advisor is the recognition that there is no cure, no guarantee, no means by which a person may conclusively change his or her sexual orientation. Whether pedophilic behavior results from biology, conditioning or both, the common understanding is that the only response is a constant and professional comprehensive treatment program where the pedophile can "develop strategies for more successfully resisting sexual and affectional temptations."<sup>154</sup> Punishment is not a cure and not a successful form of treatment; it has the highest level of recidivism. Castration as a permanent alteration of testosterone levels has ethical and moral problems for both secular and sectarian society, in spite of the lowest incidence of recidivism and elimination of reliance upon the patient to take medication.

Based on current medical evidence, the most encouraging trend is towards comprehensive treatment programs aimed at all aspects of deviant sexual behavior.<sup>155</sup> Some, like active sex education utilizing alternate sexual partners or techniques, will be seen as less available to religious denominations for use with clerical offenders or spiritual counseling. But programs emphasizing skills training or sexual abstinence are within the choices available to all denominations. Indeed, any efforts on the part of religious and secular organizations to promote community self-help groups or greater education

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antidepressant medications), (b) to restore function (as in the case of antipsychotic medications), or (c) to increase rather than decrease a person's capacity to successfully exercise self-control as in the case of MPA." *Id.*

152. Dr. Berlin reports that persons on legal probation should be able to have access to the drug just as they would if they were in prison. *Id.* Dr. Crawford reports that one means by which this can be done is to provide the drug with twice a week therapy offered by the probation service. The meetings are mandatory and the importance of the drug is emphasized. CRAWFORD, *supra* note 122, at 187-88.

153. PERSPECTIVES ON PAEDOPHILIA, *supra* note 131, at 91.

154. BERLIN & KROUT, *supra* note 7, at 168.

155. CRAWFORD, *supra* note 122, at 205. The author identifies a series of reports stating that comprehensive treatment is the best trend, but also stating that there is insufficient data to estimate effectiveness and there is a great need for additional treatment centers and programs.

concerning sexuality among the population as a whole would be welcome and would be a form of treatment.

But within any comprehensive program there must be a consideration of the use of medroxyprogesterone acetate. Secular society in the United States has adopted it as a form of treatment. It is part of the predicament of pedophilia that consideration be given to a medication that is not permanent, that does operate as a complete sexual suppressor, that does provide a hiatus in which other treatment can take place, but which does not confer conclusive long term results or effects. The ethical consideration is one of human dignity, and this aspect must permeate any religious denomination consideration of medroxyprogesterone acetate.

Finally, clerics and the religious denominations to which they belong have an argument in favor of privilege from reporting statutes because of the availability of present-day treatment for pedophilic behavior.<sup>156</sup> The medical evidence concerning pedophilia and the horrendous effect upon children of such behavior justifies the necessity of an anonymous and personal opportunity for persons who experience compulsive pedophilic behavior to seek and discover a program of treatment. This opportunity would be lost if the reporting privilege were revoked and the pedophile denied a chance to confront through another person the necessity of change, reconciliation, treatment. The reporting privilege provides a chance beyond criminal incarceration for rehabilitation. Since the medical evidence states that there are treatments available, anonymous confessional opportunities are one means to meet this need for treatment among persons affected by compulsive pedophilic urges. Even beyond the arguments of the First Amendment, privacy, or specific statutory protection, the medical evidence and possibility of treatment offer unique justification for clerics retaining the privilege.<sup>157</sup>

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156. Professor Mary Harter Mitchell suggests three arguments the cleric might make to justify the privilege from reporting: (1) requiring the cleric to report does not significantly further the state's goal of protecting children; (2) even if requiring the cleric to report does result in some additional reports of abuse, the state has alternate means of securing that information; and (3) "undermining the confidential relationship between confiders and clergy will defeat one valuable, nongovernmental means of achieving the state's goals of preventing and treating child abuse." Mitchell, *supra* note 13, at 811. The medical treatment programs and the ability of the cleric to suggest treatment—or require it as a condition of forgiveness—bolsters the third argument the cleric may make in response to the state's attempted denial of the clergy privilege.

157. Psychotherapists have also sought to use this argument: that anonymous therapy offers a chance for the pedophile to change and the privilege should be retained for them. See Cross, *Privileged Communications Between Participants in Group Psychotherapy*, 1970 LAW & SOC. ORD. 191; Smith, *Constitutional Privacy in Psychotherapy*, 49 GEO. WASH. L. REV. 1 (1980); Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 893 (1982); Note, *Where the Public Peril Begins: A Survey of Psychotherapists to Determine the Effects of Tarasoff*, 31 STAN. L. REV. 165 (1978);

### III. CRIMINAL AND CIVIL LAW PREDICAMENTS

#### A. Criminal Law

In 1984, a Florida pastor listened as a man confessed the sin of child abuse. During the course of the confession, the pastor encouraged the man to turn himself in to the police and the pastor even volunteered to accompany the man to the police station. Once there the cleric did not make a statement and did not file a report of child abuse. Later, when the man was on trial for what he had done, the judge hearing the case directed the cleric to testify as to what he had been told and the cleric refused, citing the privilege between himself and the defendant, the priest-penitent privilege. The judge cited the pastor for contempt and placed him in jail,<sup>158</sup> thus raising a modern dilemma that had been taken for granted since 1606 and the reign of King James I.<sup>159</sup> The dilemma is a conflict between privilege accorded clergy confessions and the need to identify child abusers.

While the 17th Century priest during the reign of King James was found guilty of treason for refusing to speak of a plot to assassinate the monarch, more recent cases, and especially ones in the United States have protected the right of a cleric to withhold information. Courts have found that the privilege can be rooted in freedom of religion, a state statute, free exercise clauses of state constitutions or rules of evidence. Thus, in the 1813 American case of *People v. Phillips*, a priest refused to testify concerning how he

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Note, *Functional Overlap Between the Law and Other Professionals: Its Implications for Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962). Comment, *Duties in Conflict: Must Psychotherapists Report Child Abuse Inflicted by Clients and Confided in Therapy?* 22 SAN DIEGO L. REV. 645 (1985). Pedophiles would refrain from seeking treatment for fear of disclosure; psychotherapists would refrain from eliciting pedophilic incidents for fear of having to disclose. Smith & Meyer, *Child Abuse Reporting Laws and Psychotherapy: A Time for Reconsideration*, 7 INT'L J.L. & PSYCHIATRY 351 (1984).

158. *Florida v. Mellish*, 84-9852CF810. The case was appealed to the 4th District Court of Appeals in West Palm Beach (*Mellish v. State of Florida*, 84-1930) and while on appeal the Florida legislature amended its Child Abuse Statute to exempt clergy and the case was dismissed *sua sponte*. See Ostling, *Confidence and the Clergy*, Time, Oct. 1, 1984, col. 1, at 66; Silas, *Embattled Clergy—Is Confession Always Private?* 72 A.B.A.J. 36 (1986). Note also that the offense was contempt, not the charge of failure to report an instance of child abuse. This latter offense is more probable during the latter half of the 1980's, since it is a period of heightened sensitivity over child abuse.

159. The first case citing a priest-penitent privilege was reported in *Garnett's Trial*, 2 HOW. ST. TR. 218 (1606) cited in 8 J. WIGMORE, EVIDENCE § 2394 n.1 (rev. ed. 1961). An argument can be made that the privilege dates as long as the seal of confession of the Roman Catholic Church: "The confessor is wholly forbidden to use knowledge acquired in confession to the detriment of the penitent, even when all danger of disclosure is excluded." COLLINS, THE CODE OF CANON LAW IN ENGLISH TRANSLATION, CANON 984 (London 1983). See Regan & Macartney, *Professional Secrecy and Privileged Comm.*, 2 CATH. LAW. 3, 4-12 (1956).



had received stolen goods which he had surrendered to authorities. The cleric objected to being forced to testify on the basis of his church's seal of confession<sup>160</sup> and the court allowed his privilege based on the priest's freedom to exercise his religion granted by the New York State constitution.<sup>161</sup> Based partially on this rationale, the same court denied the privilege to a Protestant minister four years later.<sup>162</sup> Then later, in response to this inequality, the New York legislature enacted the first statute granting a priest-penitent privilege.<sup>163</sup> Today, "forty-nine states, the District of Columbia, and the Virgin Islands have statutes dealing with the priest-penitent privilege."<sup>164</sup> The statutes are an improvement over the common law, but the

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160. The case is not officially published, but it is abstracted in 1 W.L.J. 109 (1843), and the original records are available at the Court of General Sessions of the County of N.Y.. See also Tinnelly, *Privileged Comm. to Clergymen*, 1 CATH. LAW. 198 (1955) [hereinafter Tinnelly]; Yellin, *The History and Current Status of the Clergy-Penitent Privilege*, 23 SANTA CLARA L. REV. 95 (1983) [hereinafter Yellin]; 8 J. WIGMORE, EVIDENCE § 2192 (rev. ed. 1961).

161. The court wrote that:

It is essential to the free exercise of a religion, that its ordinances should be administered—that its ceremonies as well as its essentials should be protected . . . . To decide that the minister shall promulgate what he receives in confession, is to declare that there shall be no penance; and this important branch of the Roman Catholic religion would be thus annihilated.

Tinnelly, *supra* note 159 at 209 (quoting *People v. Phillips*). The New York State constitution also provided that the "free exercise and enjoyment of religious profession and worship, without discrimination or preference, shall forever hereafter be allowed within this state, to all mankind." N.Y. Const. of 1777, art. XXXVIII.

162. *People v. Smith*, 2 City Hall Rec. (Rogers) 77 (N.Y. 1817). The fact that the Roman Catholic Church had a definite history regarding secrecy of its sacramental confession and the priest was adamant in asserting that fact offered a decisive difference between *Smith* and *Phillips*.

163. N.Y. REV. STAT. 72, pt. 3, ch. VII, tit. III, art. 8 (1828): "No minister of the gospel, or priest of any denomination whatsoever, shall be allowed to disclose any confessions made to him in his professional character, in the course of discipline enjoined by the rules of practice of such denomination." For a detailed discussion of the early privilege and the reporting statutes that followed, see Callahan, *Historical Inquiry into the Priest-Penitent Privilege*, 36 JURIST 328 (1976); Reese, *Confidential Communications to the Clergy*, 24 OHIO ST. L.J. 55 (1963). Comparison is invited between the state's efforts to protect the privilege by statute when it was seen in the public interest and more recent state efforts to abrogate the privilege through statute when that public interest has been affected by the rising incidence of child abuse.

164. Comment, *supra* note 35, at 439. See also Model Code of Evidence Rule 219 (1942); Univ. R. Evid. 505 (1974); Fed. R. Evid. 501, which allows for a federal interpretation: Except as otherwise required by the Constitution of the United States or provided by Act of Congress or in rules prescribed by the Supreme Court pursuant to statutory authority, the privilege of a witness, person, government, State, or political subdivision thereof shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience. However, in civil actions and proceedings, with respect to an element of a claim or defense as to which State law supplies the rule of decision, the privilege of a witness, person, government, State, or political subdivision thereof shall be determined in accordance with state law.

statutes differ from state to state, "so that there is no typical clergy privilege statute."<sup>165</sup> Indeed, with so many states seeking to modify the privilege so as to foster more reporting as a response to the concern over child abuse, state statutes are changing each day.<sup>166</sup>

Assuming that the privilege of priest-penitent is retained because of such arguments as the First Amendment of the United States Constitution, freedom of religion such as that found in the *Phillips* case utilizing a state constitution, or even the argument suggested in this Article that the privilege utilizes the medical testimony and assists the secular purpose of involving abusers in treatment, there is still a restrictive tone to the privilege. Thus, even though the privilege may be retained, it is likely that the statute granting the privilege will restrict the definition of who is a cleric, who is a penitent, the nature of "confession", and who may waive the privilege.<sup>167</sup>

Obviously an attorney, a physician, a therapist or a spouse is not a cleric when performing those other functions. Privileges attaching to each of these would be separate from the priest-penitent privilege and perhaps, when viewed from the context of the First Amendment free exercise clause, have

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165. Mitchell, *supra* note 155, at 740-41:

Colorado's statute, for example, is brief and narrow and limits the privilege to a clergyman or priest and to confessions. Conversely, Maryland's statute is brief but broad, providing that a cleric in an established church cannot be compelled to disclose any information told to him in confidence by a person seeking spiritual solace. Indiana's brief statute bluntly declares clergy incompetent as witnesses as to confessions or admissions made to them in [the] course of discipline enjoined by their respective churches. By contrast, the Kansas statute expends over 360 words detailing who counts as clergy, who counts as a penitent, and what communications are privileged.

See COLO. REV. STAT. § 13-90-107(c) (1973); MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1984); IND. CODE ANN. § 34-1-14-5 (Burns 1986); KAN. STAT. ANN. § 60-429 (1983).

166. For a discussion of state reporting statutes and the elements within each that are being affected by change, see text accompanying notes 36-41.

167. Prof. Mitchell discusses the four present versions of who may waive the clergy privilege. See Mitchell, *supra* note 156, at 755-60. Even though religious denominations such as the Roman Catholic Church would allow no waiver, (see CANON 983 (1), "The sacramental seal is inviolable; therefore, it is a crime for a confessor in any way to betray a penitent by word or in any other manner or for any reason.") there are within state statutes four possibilities. First, the cleric may not disclose; the cleric is treated as if he or she is incompetent to testify. See IND. CODE ANN. § 34-1-14-5 (Burns Supp. 1986); MICH. COMP. LAWS ANN. § 600.2156 (West Supp. 1986). Second, the cleric may not disclose without the penitent's consent; here the penitent has the ability to assert the privilege or not. See COLO. REV. STAT. § 13-90-107 (1978); MINN. STAT. § 595.02 (1)(c) (1987). Third, the cleric has the ability to assert the privilege because the statute says that he or she may not be compelled to disclose. See MD. CTS. & JUD. PROC. CODE ANN. § 9-111 (1984); VA. CODE ANN. § 8.01-400 (1984). Fourth, if the statute says that the cleric may not be forced to testify without the consent of the penitent, then the cleric and the penitent must both object to the disclosure for the privilege to apply. See KY. REV. STAT. ANN. § 421.210(4) (Mitchie/Bobbs-Merrill Supp. 1986).

less authority when discussed in the context of child abuse.<sup>168</sup> But denominations and clerics may not rely on an easy answer to the dilemma since the exact meaning of present state statutes and the full panoply of the federal free exercise clause have not been completely examined.<sup>169</sup> The statutes must be read strictly; this is especially important since the statutes carry with them both criminal penalties and civil responsibilities. So as to be included within any availability of the priest-penitent privilege, the denomination and/or cleric must attend to who is a cleric,<sup>170</sup> what is a "confessional capacity,"<sup>171</sup> who is a penitent,<sup>172</sup> and the type of communication.<sup>173</sup> In

168. A strong argument can be made that the priest-penitent privilege is especially tenable because of its free exercise basis, societal desire to foster such confidential relationships, and the new jurisprudence concerning privacy. While other privileges may rely upon these or similar rationales, arguments in favor of the priest-penitent privilege seem distinctive. See Note, *The Attorney-Client Privilege: Fixed Rules, Balancing, and the Constitutional Entitlement*, 91 HARV. L. REV. 464, (1977); Note, *Pillow Talk, Grimgribbers and Connubial Bliss: The Marital Communication Privilege*, 56 IND. L.J. 121 (1980); Shuman & Weiner, *The Privilege Study: An Empirical Examination of the Psychotherapist-Patient Privilege*, 60 N.C.L. REV. 893 (1982); Note, *Functional Overlap Between the Law and Other Professions: Its Implications for Privileged Communications Doctrine*, 71 YALE L.J. 1226 (1962); Louisell, *Confidentiality, Conformity and Confusion: Privileges in Federal Court Today*, 31 TUL. L. REV. 101 (1956); Saltzburg, *Privileges and Professions: Lawyers and Psychiatrists*, 66 VA. L. REV. 597 (1980); Comment, *A Taxonomy of Privacy: Repose, Sanctuary, and Intimate Decisions*, 64 CALIF. L. REV. 1447 (1976).

169. As regards free exercise, "[c]ase law provides little support for a free exercise grounding for the clergy privilege." Mitchell *supra* note 156, at 796. Also, "[i]t is amazing that there has been so little discussion on the possible constitutional basis for the clergy privilege." *Id.* at 793. If we utilize any of the new arguments for privacy the privilege seems to be included because, "[i]f the privacy doctrine encompasses any rights to secrecy, communications to clergy ought to be at the head of the line of privileges accorded constitutional status." *Id.* at 775. But such a claim must be associated with secrecy and religion for it to warrant the umbrella of privacy protection. See Note, *The Constitutional Right to Confidentiality*, 51 GEO. WASH. L. REV. 133 (1982); Note, *Informational Privacy: Constitutional Challenges to the Collection and Dissemination of Personal Information by Government Agencies*, 3 HASTINGS CONST. L.Q. 229 (1976); Comment, *The Constitutional Right to Withhold Private Information*, 77 NW. U.L. REV. 536 (1982).

170. Even though most religious denominations define who is a cleric, statutes and judges have impacted upon the creedal definitions. Thus, even though the Roman Catholic Church would not regard a nun as a cleric, a Missouri court expanded the definition of "clergymen" to include Sister Dominic who was acting as a spiritual director. *Eckmann v. Board of Educ.*, 106 F.R.D. 70 (E.D. Mo. 1985). *But see* *In re Murtha*, 115 N.J. Super. 380, 279 A.2d 889 (1971) (court denied a nun the priest-penitent privilege when asked to testify regarding confessions made to her by a member of the church; the canons of the religions controlled who was a cleric); *Masquat v. Maguire*, 638 P.2d 1105 (Okla. 1981) (no privilege for communications between patient and nun when she was contacted in the capacity of hospital administrator).

171. Not all statements made to a cleric are entitled to the privilege. *United States v. Gordon*, 493 F. Supp. 822, 823 (N.D.N.Y. 1980) (business conversation with priest on leave from church not privileged) *aff'd*, 655 F.2d 478, 486 (2d Cir. 1981); *In re Fuher*, 100 Misc.2d 315, 419 N.Y.S.2d 426, (1979) (privilege not applicable to questions to rabbi concerning drawing of checks while administrative employee of Yeshiva); *State v. Berry*, 324 So. 2d 822 (La.

order to invoke the privilege, each of these factors must be addressed and considered within the context of today's statutes. Failure to examine the statute properly will result in such a conflict as to elicit criminal and civil penalties from the state.

The issue is simple: If clerics are responsible under the state statutes for reporting instances of child abuse, is the cleric immune from criminal prosecution under that reporting statute if another state statute grants to him or her a privilege from reporting because of priest-penitent confidentiality? In other words, once a reporting statute mandates reporting, is the cleric exempt if he or she learns of the abuse during the course of a confessional encounter?<sup>174</sup>

Initially, this may seem to be a conflict of state statutes, one mandating reporting and the other creating privilege, but because there are few federal or state constitutional decisions, the issue has far greater ramifications. As Professor Mary Harter Mitchell writes:

Unless a state has determined that clergy need not report abuses, it

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1975) (no privilege for admissions made to minister present when defendant came to pawn a watch because primary purpose of visit not to seek spiritual advice) *cert. denied*, 425 U.S. 954 (1976); *Wainscott v. Commonwealth*, 562 S.W.2d 628 (Ky. 1978) (no privilege for comments made to a minister as a friend), *cert. denied*, 439 U.S. 868 (1978); *Burger v. State*, 238 Ga. 171, 231 S.E.2d 769 (1977) (statements to a cleric who was a friend and companion of intent to kill wife and her lover were not privileged).

172. The Kansas statute is quite specific as to "any person" who could be considered a penitent:

Penitent' means a person who recognizes the existence and the authority of God and who seeks or receives . . . advice or assistance in determining or discharging his or her moral obligations, or in obtaining God's mercy or forgiveness for past culpable conduct.

Kan. Stat. Ann. § 60-429(a)(4) (1983).

173. This ingredient of the priest-penitent privilege is often vague because the state must avoid recognizing one religion's definition of "confession" and not another's. There is a distinction made between counseling and confession; whether or not the privilege is destroyed if there is a third person present; whether or not the privilege extends to observations or only to words; and finally, whether or not the denomination requires confession or counseling. The essential ingredient seems to be confidentiality: "all versions of the clergy privilege require that the privileged communication be confidential. The communication is considered confidential if the circumstances reasonably indicate the confider's expectation of secrecy." Mitchell, *supra* note 155, at 750-51. See Knapp & VandeCreek, *Privileged Comm. for Pastoral Counseling: Fact or Fancy?* 39 J. PASTORAL CARE 293 (1985). The District of Columbia statute protects communications to a cleric "by either spouse, in connection with [any] effort to reconcile estranged spouses without the consent of the spouse making the communication." D.C. CODE ANN. § 14-309(3) (1981).

174. Once again it is important to note that at no time does this article suggest that a cleric should be immune from prosecution for the crime of child abuse itself if he or she is the perpetrator of the crime. Any immunity from prosecution concerns that derived from any applicable priest-penitent privilege applicable because the cleric "witnesses" the pedophilic act of another during the course of a penitential session.

must address an overriding concern: whether a cleric has a constitutional right to maintain confidentiality in the face of a statutory requirement. If such a right exists, the inquiry alters dramatically. Legislatures contemplating statutory amendments and courts construing statutes must still balance the reasons for reports against the cleric's reasons for refusing to report. That balancing, however, must comport with first amendment principles.<sup>175</sup>

The consequences are severe; assuming that the issue cannot be resolved through statutory construction, the cleric faces the possibility of incarceration if he or she fails to report and is not protected by the privilege.<sup>176</sup> More than half of all the states have reporting statutes that contain language making reporting a responsibility for clerics. Of course, if the cleric also serves in another capacity—teacher, social worker, or counselor, for example—the issue is further complicated because the reporting statute is almost certainly applicable and there would be no priest-penitent privilege because of the character of the communications.<sup>177</sup> All of these elements must be taken into consideration; the bottom line being that over half the states have statutes mandating reporting for clerics as clerics, most open-ended in scope and without any clarification from other statutes or case law.

Once the state has adopted a reporting statute that could be read as including a cleric, that same state may go even further and *expressly* state that certain privileges shall not excuse mandatory reporting. Indeed, three states

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175. Mitchell, *supra* note 156, at 793. It is beyond the scope of this article to discuss in detail the various constitutional arguments inherent in any discussion of the first amendment and the free exercise clause. Thus, I am further indebted to Professor Mitchell for her insights and extensive comments. See *Id.* at 793-821.

176. Typical of the criminal penalties associated with failure to report is the California statute:

Any person who fails to report an instance of child abuse which he or she knows to exist or reasonably should know to exist, as required by this article, is guilty of a misdemeanor and is punishable by confinement in the county jail for a term not to exceed six months or by a fine of not more than one thousand dollars (\$1,000) or by both.

CAL. PENAL CODE § 11172(e) (West 1986). In Texas the legislature has abrogated the priest-penitent privilege and also utilizes an all-inclusive reporting requirement:

(a) A person commits an offense if the person has cause to believe that a child's physical or mental health or welfare has been or may be further adversely affected by abuse or neglect and knowingly fails to report . . . .  
(b) An offense under this section is a Class B misdemeanor.

TEX. FAM. CODE ANN. § 34.07 (Vernon 1987).

177. It may seem odd that the states have allowed this confusion to develop in their criminal codes. Not so, writes Professor Mitchell. "Given the relative newness of reporting requirements and the paucity of case law addressing the tension, this oversight is not surprising." Mitchell, *supra* note 156, at 787. Please note the confusion that resulted from the recently inaugurated concern over abuse in gestation. Does the abuse statute apply to the fetus? See *supra* text associated with notes 37-73.

expressly abolish the priest-penitent privilege and a fourth can be read to do the same.<sup>178</sup> Thus, at present, in the states of Washington, Arkansas, Louisiana and Idaho the state legislature has expressly abolished the privilege as a defense to any failure to report child abuse under the state's reporting statutes. If a "priest" were to hear the "confession" of a "penitent" that included an incident of child abuse and that priest did not report the incident in accordance with the reporting statute, the priest would be guilty of criminal misconduct.

The states that have not expressly abrogated the privilege may include the abolition as part of a general abrogation of all professional privileges, or at least all except that between attorney-client. Thus, in Texas, the statute reads:

In any proceeding regarding the abuse or neglect of a child or the cause of any abuse or neglect, evidence may not be excluded on the ground of privileged communications except in the case of communications between attorney and client.<sup>179</sup>

Only a few states have *expressly* retained the privilege: Kentucky, Oregon and South Carolina; a few more are silent as to the priest-penitent privilege, thus implying that it is still in effect. But silence still connotes potential conflict and presents a significant predicament for the cleric, caught among the criminal offense, the responsibility to his or her religious duties, the personal abhorrence of child abuse and consideration of the medical needs of the penitent.

This conflict is certain to result between the needs of the state in addressing the issue of child abuse and the free exercise [of religion] of the cleric.<sup>180</sup> As with the early case of *People v. Phillips*,<sup>181</sup> courts may construct a constitutional guarantee of free exercise of religion, thus establishing the priest-penitent privilege through constitutional interpretation, rather than statutory provision. But the factual basis of *Phillips* is defined narrowly: a Roman Catholic sacramental confession, a Roman Catholic priest, the New York state constitution rather than the federal constitution, and a strict re-

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178. See *supra* note 35.

179. Tex. Fam. Code § 34.04 (Vernon 1986). The North Dakota statute is more inclusive but similar to that of Texas. The North Dakota statute reads:

Any privilege of communication between husband and wife or between any professional person and his patient or client, except between attorney and client, is abrogated and does not constitute grounds for preventing a report to be made or for excluding evidence in any proceeding regarding child abuse or neglect resulting from a report made under this chapter.

N.D. CENT. CODE § 50-25.1-10 (1982).

180. U.S. Const. Amend. I: "Congress shall make no law . . . prohibiting the free exercise [of religion]."

181. *People v. Phillips*, N.Y. Ct. Gen. Sess. (1813).

quirement of secrecy understood by both priest and penitent. In today's society the privilege is enjoyed by a much wider group of "priests" and the constitutional arsenal much larger than it was during the early nineteenth century. There are many more variables today.

*Phillips* will be the beginning of the constitutional argument. Today, the issue will involve considerations of denominational support: dogma, creeds, practices. "A cleric lacking church backing may . . . have more difficulty convincing a court that the asserted belief in secrecy is religious"<sup>182</sup> and that the state reporting requirement infringes his religious beliefs. Thus, while courts have not developed a specialized jurisprudence of free exercise for professional clergy, the cleric who claims the privilege as part of an announced church dogma proclaiming confessional practice a part of the practice of religion is more likely to enjoy the protection of the privilege. It is doubtful if the court would be able to make any inquiry<sup>183</sup> into the background or reason for such a religious dogma, but dogmatic formulations will form the key to establishing any protection under any applicable state privilege statute, or for establishing a free exercise argument that such a privilege exists beyond state statutory authority, it exists in the state or federal constitution. "The constitutional argument grows naturally from the Supreme Court's free exercise decisions and accords with the momentous shared value of religious liberty."<sup>184</sup>

The balance between individual free exercise and compelling state interest will be the constitutional battleground. We have seen the basis for the free exercise rationale; the state's interest has been formulated through the medical evidence of child abuse in gestation, the rising statistics concerning child abuse, the state's need to identify and commence treatment for offenders, and the traditional concern of the state for the health and safety of its citizens.<sup>185</sup> Because of the inflammatory nature of pedophilia and the fact that newspaper report new instances almost weekly, the balancing that will be

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182. Mitchell, *supra* note 156, at 801. Specifically, Professor Mitchell suggests that church groups "may be wise to adopt some official policy regarding the secrecy of confidential communications to their clergy." *Id.* at note 423 *infra*. See Recommendations at 109.

183. The level of dogmatic inquiry available to a court is limited. As Professor Mitchell writes: "Such a judicial inquiry threatens to entangle courts in religious questions that they are practically and constitutionally incompetent to address. Yet a court is surely entitled to determine whether the claimed infringement on religion is more than *de minimis* before requiring a compelling state interest to justify the infringement." Mitchell, *supra* note 155, at 805-06.

184. *Id.* at 795-96. See Kelly, *Beyond the Priest-Penitent Privilege: The Church, The FBI and Privacy*, 38 CHRISTIANITY IN CRISIS 28 (1978).

185. See Pepper, *The Case of the Human Sacrifice*, 23 ARIZ. L. REV. 897 (1981); Areen, *Intervention Between Parent and Child: A Reappraisal of the State's Role in Child Neglect and Abuse Cases*, 63 GEO. L.J. 887 (1975). These articles discuss the balancing of the state interest with the individual rights of free exercise and liberty.

done will perforce be done upon a turbulent societal base. Any successful balancing must provide for the defined scope of the free exercise clause on the one hand, and the compelling state interest to be definitively served by the state regulation on the other hand. The state must establish that the statute abrogating the clergy privilege *or* the statute mandating reporting by clergy does *in fact* contribute to the state interest in lessening child abuse.<sup>186</sup> Furthermore, the state must establish that there are no alternative means and that the present practice sought to be outlawed does *in fact* work against the compelling state interest.<sup>187</sup> Also, because the state should have the burden of proof, the cleric should not have to present empirical data demonstrating that the clergy privilege does *in fact* contribute to the state's efforts.<sup>188</sup> Obviously however, empirical data would assist the argument that the clergy privilege does assist the common good and deserves recognition in statute.

There are few indications that the criminal law of any particular state will be used to prosecute a cleric for failure to report an instance of child abuse when the cleric discovers the abuse during a penitential discourse. But the predicament exists. States have recently modified their reporting statutes to include persons operating in clerical functions and the reporting statutes mandate criminal penalties for failure to comply. Obviously, should a person who happens to be a cleric learn of an instance of child abuse while functioning outside of a "confessional" capacity, said reporting statute would apply and the cleric would have no defense for failure to report. But when there is a reporting statute made applicable to the cleric and the cleric is functioning as a cleric in a dogmatically defined "confessional" capacity, the cleric may have recourse to the priest-penitent privilege against disclosure and be immune from criminal prosecution.

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186. *Thomas v. Review Bd.*, 450 U.S. 707 (1981); *McDaniel v. Paty*, 435 U.S. 618 (1978); *Wisconsin v. Yoder*, 406 U.S. 205 (1972). All three cases required the state to show that the means it had chosen to effectuate a particular end did, in fact, effectuate that end. When that could not be shown, the state's statute was found to be unconstitutional.

187. Recognition of the medical evidence previously discussed in this article is a purported effort to establish that the clergy privilege of secrecy actually assists the secular objective of identifying abusers and lessening child abuse. The point being, that for many persons, "a religious response to their problems, framed in the religious categories that are most deeply meaningful to them, may be more effective than secular interventions." Mitchell, *supra* note 156, at 817. The religious availability of confession assists such persons and the secular objective of decreasing abuse.

188. Professor Mitchell argues that despite some language in a 1972 Supreme Court case, "clergy should not need empirical data to prove that their disclosures of confidential communications will deter further confiding." Mitchell, *supra* note 156, at 813. See *Branzburg v. Hayes*, 408 U.S. 665 (1972). This argument should apply to all data requirements when such requirements are used to interfere with constitutional protections.



Today's predicament is whether or not there is a priest-penitent privilege available to the priest through common law or statute or, in the state's desire to lessen child abuse, has that privilege been abrogated. If the privilege is no longer available, may the cleric nonetheless refuse to report because he or she possesses a constitutionally guaranteed freedom to exercise religion and his or her religion includes the secrecy of the confessional?<sup>189</sup> Will this protect against criminal prosecution by the state?

There is no answer to the criminal law predicament of the cleric and the reporting requirements recently inaugurated by the states.<sup>190</sup> The litigation involved will be expensive and extensive involving the balancing of state and individual interests. Because of the possible emotional content of the child abuse issue, adequate care and respect for all the issues involved is recommended.

### *B. Civil Law*

The consequences of failure to comply with the criminal reporting statutes are awesome for the cleric. But with each criminal violation there arises the compensatory and punitive damages associated with civil wrongs. For instance, if a reporting statute places a responsibility upon a cleric to report all instances of child abuse and the cleric learns of a child who has been repeatedly abused by a parent, does the cleric have a duty to report? Clearly the answer is yes; the statute mandates reporting.<sup>191</sup> If the cleric does not report, the cleric is guilty of a criminal offense. But further, if the cleric knows of the incident and does not report *and* further abuse takes place causing emotional and physical damage to the child, is the cleric liable for civil damages to the child? Does that liability result because of the statute's require-

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189. While arguments can be made that there is a definite right to privacy within the Constitution, such arguments would best be left to physicians, psychotherapists, and even attorneys. The cleric can retain such arguments while asserting his or her own unique protection found within the free exercise clause of the first amendment.

190. Suggestions that reporting statutes be changed to allow permissive reporting if the cleric wishes is not a solution to the predicament. One author has recommended the following statute: "If the communication threatens harm to any person, the Clergyman may, but is not required to disclose the communication to avoid occurrence of that harm." Yellin, *supra* note 160, at 156. If such an approach is feasible at all, perhaps a better suggestion would be to make the privilege available in proportion to the dogmatic understanding of the cleric's church or denomination, rather than relying upon a nebulous understanding of secrecy on the part of the cleric.

191. It is important to note that in many Roman Catholic dioceses throughout the United States, procedures have been implemented to notify the authorities immediately when any instance of child abuse has been discovered. This is the case even though the alleged abuser is a cleric or church employee. For a complete list of the procedures implemented, contact: General Counsel's Office, United States Catholic Conference, 1312 Massachusetts Avenue, N.W., Washington D.C. 20005.

ment that the cleric report? How can the cleric be responsible for the acts of an abuser, a third person? Will the cleric be able to claim charitable immunity because of his association with a religion? And finally, does the liability of the cleric end if the cleric learned of the abuse during confession and not during a casual setting? Or stated another way, is the reporting statute's civil effects nullified in respect to a cleric because of the priest-penitent privilege?

The civil predicament of the cleric in respect to the issue of child abuse is also awesome. Because many of the issues raised in the criminal sphere have not been addressed, the civil issues remain unanswered. Also, just as the rise in the incidents of child abuse and the advances in medical technology have caused states to issue new reporting statutes or to abrogate some if not all of the professional privileges, so have they focused a stricter scrutiny upon clergy and clerical responsibilities. Clerics are being incarcerated; bishops are being sued, ministers are sued for malpractice and a rabbi asks in a law review article: "Is the Cloth Unraveling?"<sup>192</sup> The answer is yes and no. Yes, clerics will be held to the professional standard to which they aspire and no, there is no loss of respect for the office. On the contrary, there is sufficient respect to require accountability.

National newspapers record evidence of this civil accountability. On September 15, 1987, the parents of a youth who was sexually assaulted by a priest of the Roman Catholic Archdiocese of Washington, sued the Archdiocese and the priest for \$6 million dollars compensatory and punitive damages.<sup>193</sup> The suit, filed in D.C. Superior Court, "claimed that the church was negligent for not detecting the priest's sexual problems that led to the assaults."<sup>194</sup> On the West Coast, the parents of a 13 year-old Catholic school student allegedly molested by a priest have filed a \$110 million suit against the Roman Catholic Archdiocese of Los Angeles, asserting that the church and school officials repeatedly ignored the boy's pleas for help.<sup>195</sup> And in the middle of the nation, there was a \$6.75 million damage settlement in Lafayette, Louisiana; "Two civil grievances involving one priest in a Midwestern diocese were recently settled for approximately \$600,000, and an Idaho case was settled for \$25,000."<sup>196</sup> All of the cases involve elements

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192. Bergman, *Is the Cloth Unraveling? A First Look at Clergy Malpractice*, 9 SAN FERNANDO V.L. REV. 47 (1981). The author suggests that the advances made in scientific knowledge suggest that clergy have a minimum measure of education and training and not rely on intuition or native ability alone. Malpractice is the consequence of acting otherwise.

193. Wash. Post, Sept. 16, 1987, at B2, col 6. The priest had pleaded guilty to five counts of sexual abuse and was sentenced to 25 years in prison.

194. *Id.*

195. L.A. Times, Dec. 14, 1986, Metro, Part 2, at 2, col. 1.

196. Nat'l Cath. Rep., May 30, 1986, at 15 col. 2.

of intentional tort, negligence, statutory liability or a combination of all three.

Certainly a cleric who abuses a child is liable for the criminal offense of child abuse and he or she will be expected to satisfy the criminal penalties.<sup>197</sup> But what of the civil responsibilities of the offending cleric to the child for the serious emotional distress caused by the offense? There is always the civil claim of battery, and states now have statutes and various theories which provide recovery for the intentional infliction of serious emotional distress.<sup>198</sup> For instance, in Ohio the state's highest court, in recognizing intentional infliction of emotional distress as an independent tort accepted that: "one who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."<sup>199</sup> Under this theory, the child abused by a cleric or any other person is likely to recover if the following elements are present:

- (1) the abuser either intended to cause emotional distress or knew or should have known that the actions taken would result in serious emotional distress to the child.
- (2) the abuser's conduct was extreme and outrageous, it went beyond all possible bounds of decency, and it can be considered as utterly intolerable in a civilized community.
- (3) that the abuser's actions were the proximate cause of the child's psychic injury, and
- (4) that the mental anguish suffered by the child is serious and of a nature that no reasonable person could be expected to endure

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197. One study concerning the criminal penalties given to nonviolent child molesters who either plead guilty or are convicted by the courts, found that about 17% receive some prison term, 24% are assigned to a mental institution for a time, and over 50% are placed on probation after conviction. RUTH S. & C. HENRY KEMPE, *THE COMMON SECRET: SEXUAL ABUSE OF CHILDREN AND ADOLESCENTS* 87 (1984).

198. While it is beyond the scope of this article to develop all of the theories concerning tort liability for child abuse, current theories are presented. See Comment, *Civil Remedies for Victims of Childhood Sexual Abuse*, 13 OHIO N.U.L. REV. 223 (1986); Annotation, *Right of Minor Child to Sue Parent or Person in Loco Parentis for Personal Tort*, 19 A.L.R.2d 423 (1951); Comment, *Adult Incest Survivors and the Statute of Limitations: The Delayed Discovery Rule and the Long Term Damages*, 25 SANTA CLARA L. REV. 191 (1985). Battery, intentional infliction of emotional distress, and statutory theories of negligence are the ones most favored.

199. *Yeager v. Local Union 20*, 6 Ohio St.3d 369, 374, 453 N.E.2d 666, 671 (1983). The case involved an action for compensatory and punitive damages by a vice-president and general manager of a Toledo, Ohio, company. The plaintiff alleged that members of a local union made menacing remarks to him and as a result plaintiff suffered severe physical consequences: stomach pain, anxiety and a medical expense of \$5,000. The Supreme Court of Ohio admitted it was the last state to recognize the independent tort of the intentional infliction of serious emotional distress and allowed plaintiff to now seek recovery upon that ground. *Id.* at 373, 453 N.E.2d at 6.

it.<sup>200</sup>

While many of the discussions associated with pedophilic behavior state that the intention of the abuser may not be to inflict any emotional or physical harm, but rather to develop a caring and intimate relationship, recovery could still be obtained under the theory. Mental distress as a consequence of abuse has been shown through the medical evidence presented and liability for such an extreme outrage as fondling children is broader than intent. "This is the type of conduct which commonly is given the name of willful or wanton, or sometimes recklessness."<sup>201</sup> Harm can be foreseen, causation can be proven, and society can be outraged because of the medical testimony that is now available concerning the consequences of child abuse. The responsibility of the abuser for the civil consequences of child abuse can be achieved through express theories or statutes concerning intentional torts.<sup>202</sup>

But such an approach posits the liability of the abuser. Is there a liability for one who knows, should have known, or reasonably suspects abuse? Here the liability shifts from the abuser to the religious superior, the confessor in the priest-penitent situation, the confidential relationship peer. The civil liability of the abuser is much more clear than the liability of the "one who knows." Also, because of the uncertainty of the privilege protection under the free exercise clause, the predicament of the clergy is especially precarious.

This liability for "knowing" and not preventing future harm when there is a duty to do so, has been established against physicians. Courts have allowed statutory civil liability for failure to report abuse in addition to the

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200. *Pyle v. Pyle*, 11 Ohio App.3d 31, 34, 463 N.E.2d 98, 103-4 (1983). Unlike the labor dispute facts of *Yeager*, this case involved a visitation dispute between parents. Even though the court would not allow recovery by a father against his former wife for interfering with the visitation rights in regard to a child, the court did list these elements as necessary to eliminate the speculative nature of a claim made under the intentional infliction theory. See also RESTATEMENT (SECOND) OF TORTS § 46, comment d, § 77, comment j (1965).

201. W. PROSSER, THE LAW OF TORTS § 12, at 60 (4th ed. 1971). Dean Prosser reasons that the law cannot provide recovery for every instance of abuse, but that does not mean there is no way by which the law cannot compensate for a genuine, serious mental injury.

202. California, a state where many of the most innovative of the tort theories originated, allows for the intentional infliction of emotional distress under the following test: A defendant is liable for the particular harm he or she intended to cause when it occurs, whether or not it was foreseeable that his or her conduct would bring about such harm. He or she is also liable if he or she acted with reckless disregard of the probability of causing the harm. See *Agarwal v. Johnson*, 25 Cal. 3d 932, 946, 160 Cal. Rptr. 141, 149, 603 P2d 58, 66 (1979); RESTATEMENT (SECOND) OF TORTS § 46 (1965): "Outrageous Conduct Causing Severe Emotional Distress, (1) One who by extreme and outrageous conduct intentionally or recklessly causes severe distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm."

criminal penalty of failing to report. In the case of *Landeros v. Flood*,<sup>203</sup> California had a Penal Code statute stating that every physician who has under his care any person who may be suffering from an injury inflicted in violation of any penal law of the state [this would include child abuse laws], must report that fact by telephone and in writing to the local law enforcement authorities and the juvenile probation department.<sup>204</sup>

Plaintiff in the case was seeking compensatory damages "for personal injuries caused by defendants' negligence in failing to properly diagnose and treat the condition from which plaintiff was suffering."<sup>205</sup> The condition was battered child syndrome as evidenced by multiple bruises, a comminuted spiral fracture of the right tibia and fibula, a nondepressed linear fracture of the skull, abrasions and fear and apprehension.<sup>206</sup> Also, and this is directly pertinent to the cause of action being brought against the "person who knows," plaintiff asserted that the defendant doctor was "statutorily liable" for failing to report when he was under an obligation to do so by the state statute. "The purpose of that theory is manifestly to raise a presumption that by omitting to report plaintiff's injuries to the authorities as required by law, defendants failed to exercise due care—a presumption now codified."<sup>207</sup> The defendant physician had the duty to rebut that presumption<sup>208</sup> and it is no defense that he may claim exemption from reporting

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203. 17 Cal.3d 399, 131 Cal. Rptr. 69, 551 P.2d 389 (1976). The case cites articles in support of the liability placed upon those who have a duty to report, do not do so, and harm to a plaintiff results after the discovery. See Isaacson, *Child Abuse Reporting Statutes: The Case for Holding Physicians Civilly Liable for Failing to Report*, 12 SAN DIEGO L. REV. 743 (1975); Ramsey & Lawler, *The Battered Child Syndrome*, 1 PEPPERDINE L. REV. 372 (1974); Fraser, *A Pragmatic Alternative to Current Legislative Approaches to Child Abuse*, 12 AM. CRIM. L. REV. 103 (1974); Paulsen, *Child Abuse Reporting Laws: The Shape of the Legislation*, 67 COLUM. L. REV. 1 (1967); Kohlman, *Malpractice Liability for Failing to Report Child Abuse*, 49 CAL. ST. B.J. (1974).

204. See Cal. Penal Code §§ 11161-11161.5 (West 1970). In addition to physicians, health care professionals, school officials, teachers, child care supervisors and social workers also have a duty to report. Note that many states are moving towards a reporting requirement for "any person."

205. *Landeros v. Flood*, 17 Cal.3d 399 at 405, 131 Cal. Rptr. 69 at 71, 551 P.2d 389 at 391 (1976).

206. *Id.*

207. *Id.*

208. The presumption is found in Cal. Evid. Code § 669 (West 1965):

- (a) The failure of a person to exercise due care is presumed if:
  - (1) He violated a statute, ordinance, or regulation of a public entity;
  - (2) The violation proximately caused death or injury to persons or property;
  - (3) The death or injury resulted from an occurrence of the nature which the statute, ordinance, or regulation was designed to prevent; and
  - (4) The person suffering the death or the injury to his person or property was one of the class of persons for whose protection the statute, ordinance, or regulation was adopted.

under the physician-patient privilege. The code specifically exempted the physician from any criminal or civil liability for making a report,<sup>209</sup> thus depriving him of the defense of the privilege.

The court allowed the case to go to the jury because the statute providing a duty to report also provided a civil cause of action against any person who, having a duty and knowing of a reportable offense, failed to report. The legislature viewed this as a means by which child abuse may be lessened through expanded reporting requirements. The criminal and civil penalties follow from that compelling state interest.

As with a physician, so too with a psychologist. In another California case, *Tarasoff v. Regents of the University of California*,<sup>210</sup> the court decided that: "When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger."<sup>211</sup> This common law duty to report—if this will exercise reasonable care—creates in the psychologist as well as the physician, a civil liability to those injured. Because this liability is directed towards the "person who knows," rather than the person who commits the abuse, the liability for injury proximately resulting from child abuse is expanded to include the superiors and associates of the cleric. Also, and this has yet to be determined, it potentially includes that matter revealed in confession, for this will involve a cleric in the act of knowing. Certainly it includes the cleric acting as counselor alone.

An important distinction must be made and a conclusion drawn. When a

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(b) This presumption may be rebutted by proof that:

(1) The person violating the statute, ordinance, or regulation did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law.

209. Cal. Penal Code § 11161.5 (West 1970). Note that no mention is made of the ethical responsibility of the physician to maintain the confidentiality of the client. Although this ethical duty is not identical with the free exercise religious demands of a religious denomination, it is a consideration to many physicians. The court interprets the legislative action in mandating reports as saying it is in the best interest of the client that the report be made, thus directing the physicians toward a different responsibility than confidentiality and privileged communications.

210. 13 Cal.3d 177, 529 P.2d 553, 118 Cal. Rptr 129 (1974), *aff'd*, 17 Cal.3d 425, 551 P.2d 334, 131 Cal. Rptr. 14 (1976). See also Fleming & Maximov, *The Patient or His Victim: The Therapist's Dilemma*, 62 CALIF. L. REV. 1025 (1974); Note, *Tort Law—The Psychiatric Duty to Warn: Cairl v. State*, 6 HAMLINE L. REV. 513 (1983); Note, *Psychotherapists and the Duty to Warn: An Attempt at Clarification*, 19 NEW ENG. L. REV. 597 (1984).

211. 17 Cal.3d 425, 431, 551 P.2d 334, 340, 131 Cal. Rptr. 14, 20 (1976). The court rejected arguments based on privacy, privilege, and confidentiality in treating mental illness, and decided that the paramount interest was protecting persons from violent attacks. *Id.* at 440 n.12, 551 P.2d at 346 n.12, 131 Cal. Rptr. at 26 n.12 (1976).

minister, rabbi or priest enters into the specific relationship known as "confession", this is not the same as counseling. Words such as reconciling, forgiveness, penance and contrition are associated with the former and not with the latter. It is safe to conclude that if the priest-penitent privilege is sustained through first amendment free exercise arguments or through express state statutes, thus protecting the "one who knows" from criminal and civil liability, the protection will only apply if there is a clear and distinct "confessional" relationship between the abuser or the abused *and* the "one who knows." If the abuse is discovered during the course of counseling or another "confidential" discourse, but not within confession, liability will result; if the "one who knows" is a cleric but at the time of learning of the abuse is serving as another professional and that profession is not protected under a privilege statute, liability will follow. Indeed, in addition to the civil liability established in cases such as *Yeager* and *Tarasoff*, recent cases have debated the issue of "clergy malpractice" for negligence during counseling sessions.

Today, clerics who seek to counsel—and this would especially pertain to the complex issues surrounding the medical treatment of pedophiles—confront the issue of civil liability for negligent counseling. If counseling is in fact different from "confession" then privilege will not apply, the cleric will most likely have a duty to report, and civil liability will result from failure to do so under one of the theories previously enounced or from clergy malpractice resulting from the counseling session.

In the California case of *Nally v. Grace Community Church of the Valley*,<sup>212</sup> a young man, Kenneth Nally, began meeting on an irregular basis with the pastor of Grace Community Church to discuss problems with his girlfriend and his father. The young man had a history of depression for at least three years prior to these meetings. At one point the man was admitted to the hospital after an attempted suicide. There the pastor told him to cooperate with the psychiatrists at the hospital, but he refused; the pastor then recommended that he undergo tests at a hospital to determine if there were any physical causes for his depression. He did not go to the hospital. Shortly afterwards, he entered a friend's apartment and committed suicide. The parents sued Grace Community Church and the pastors under the California Wrongful Death statute asserting three claims: clergy malpractice,

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212. 157 Cal. App.3d 912, 204 Cal. Rptr. 303 (1984). The case prompted a great deal of controversy. See Note, *Religious Counseling—Parents Allowed to Pursue Suit Against Church and Clergy for Son's Suicide—Nally v. Grace Community Church*, ARIZ. ST. L.J. 213 (1985) (author concluded that the free exercise clause would protect the defendants from liability); Comment, *supra*, note 127 (author also argues that the First Amendment protections and public policy outweigh any examination by a state court of claims of malpractice by clergy).

negligence and outrageous conduct.<sup>213</sup> In essence, the parents alleged that by virtue of his counseling and omissions, the pastor was negligent in failing to exercise the standard of care for a clergyman of his sect and training in the community, which proximately resulted in the young man's suicide.<sup>214</sup>

The California Code of Civil Procedure section 377 provides that the heirs or personal representatives of a decedent may bring an action against the person whose negligent or wrongful conduct caused the death.<sup>215</sup> It is an action to compensate the survivors for pecuniary losses of support, society, comfort, care and protection provided by the deceased.<sup>216</sup> In the *Nally* case the issue is whether the defendant should be held liable for the injury to which the defendant has made a substantial contribution, when the injury was brought about by a later cause of independent origin.<sup>217</sup>

The California court decided that this was an issue that could go to trial because: (1) substantial facts existed as to whether the pastors engaged in extreme and outrageous conduct, either intentionally or recklessly, and whether their counseling was a substantial factor in causing the young man's death; (2) the plaintiff-parents adequately pled a cause of action based on the wrongful death statute because they alleged that the pastor and church, while knowing that the young man was depressed and had suicide tendencies, recklessly exacerbated his feelings of guilt, anxiety, and depression, and that the defendants acted without considering that their conduct would increase the likelihood that the young man would commit suicide; and (3) the first amendment free exercise clause did not license intentional infliction of emotional distress in the name of religion and could not isolate defendants from liability for a suicide caused by such conduct.<sup>218</sup>

Theories upon which *Nally* rests have resulted in clergy malpractice insur-

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213. *Id.* at 309.

214. *Id.* at 309-10.

215. CAL. CIV. PROC. CODE § 377 (West Supp. 1984). Recall that under the common law, death terminated all causes of action the decedent might have had for personal torts, and gave rise to no personal cause of action. Therefore, the right to recover for another's wrongful death and the right to recover on a cause of action that survives the decedent are purely statutory. See W. PROSSER & W. KEETON, THE LAW OF TORTS § 127, at 945 (5th ed. 1984) [hereinafter PROSSER & KEETON].

216. See e.g., *Krouse v. Graham*, 19 Cal. 3d 59, 562 P.2d 1022, 137 Cal. Rptr. 863 (1977); *Dickinson v. Southern Pacific Co.*, 172 Cal. 727, 158 P. 183 (1916).

217. See e.g., Comment, *Civil Liability for Causing or Failing to Prevent Suicide*, 12 LOY. L.A.L. REV. 967, 974 (1979); PROSSER & KEETON, *supra* note 215 at 301, asking: Why should the defendant be relieved of liability for something as to which the defendant's conduct is a cause, along with other causes?

218. *Nally*, 204 Cal. Rptr. at 308-09. The court separated the free exercise clause into the freedom to believe and the freedom to act. The conduct of the pastors and the church in *Nally* fell into the latter classification.



ance,<sup>219</sup> and yet another appraisal of the free exercise protection of clerics and their role as counselors. Note however, that "the precise issue presented in *Nally*—whether the free exercise clause can shield a defendant from liability in common law tort action—has never been presented to the Supreme Court for resolution."<sup>220</sup> This places the cleric in a tenuous predicament, offering the possibility of extensive constitutional litigation, maintenance of insurance, refusal to do counseling, or offering counseling only in the context of the confessional. It places the denomination or church with which the cleric is associated to also seek protection through insurance, doctrines such as charitable immunity, or statutes imposing a limitation upon the time within which the suit may be brought.

Clerics and the churches with which they are associated have found some protection within established immunity doctrines. For instance, in spite of a particularly harsh dissent,<sup>221</sup> the Supreme Court of New Jersey held that the state's charitable immunity act barred the claim by the beneficiary of charitable activity from bringing suit against the charity based on negligent hiring. In the case of *Schultz v. Roman Catholic Archdiocese of Newark*, the Archdiocese had hired a Brother Edmund as an instructor at a school and as a scoutmaster for the Boy Scout group sponsored by the parish. During the spring and summer of 1978, Brother Edmund forced an 11 year-old boy to engage in sexually provocative activities and in sexual contact with him, threatening the boy not to tell his parents. In fall the boy told his parents and they immediately notified the Archdiocese.<sup>222</sup>

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219. See generally Marty, *Ministerial Malpractice*, 96 CHRISTIAN CENT. 511 (1979); Breecher, *Ministerial Malpractice*, LIBERTY Mar.-Apr. 1980. Three major Christian denominations now have or provide malpractice insurance coverage for their clergy: the United Presbyterian Church, the United Methodist Church, and the Lutheran Church in America. Comment, *supra*, note 127 at 511-12.

220. Note, *supra*, note 212 at 234. But while the Supreme Court has not made a pronouncement, lower courts have decided that the free exercise clause does not eliminate liability when the challenged action violated a strong public policy or represented a danger to the individual's health or well being. *Id.*

221. *Schultz v. Roman Catholic Archdiocese*, 95 N.J. 530, 535, 472 A.2d 531, 536 (N.J. 1984). The dissent found that the New Jersey Charitable Immunity Act was not applicable to the facts of that particular case which included an intentional tort: the negligent hiring, supervision and retention of potentially harmful employees by the entity constitutes an exception to the rule of charitable immunity.

222. *Id.* at 531, 472 A.2d at 532. The complaint stated that Brother Edmund required the boy to swim in the nude, provided him with pornographic magazines, provocative underwear—which he was required to wear—and then demanded physical contact to include the boy manually masturbating Brother Edmund. The complaint also stated that the boy's brother, two years older, had also been abused by Brother Edmund while at the camp. The brother had posed for photographs, entered into deviant sexual conversation, and Brother Edmund would masturbate in the brother's presence. See Complaint at 1, *Schultz v. Roman Catholic Archdiocese*, No. L-12608-80 (N.J. Super. Ct., Law Div. 1981), *aff'd*, No. A-04606-

Throughout the winter and spring of 1979, the boy received extensive psychiatric and medical care and was hospitalized. Finally, in May 1979, the boy committed suicide by taking drugs.<sup>223</sup> The parents sought compensation for the boy's suffering and for their own damages, claiming that the Archdiocese was negligent, reckless, and careless in hiring Brother Edmund and permitting him to have young boys under his care, in failing to determine his prior employment history, in failing to supervise him, and that the defendant was otherwise negligent.<sup>224</sup> The church replied that because they were a charity, the parents' complaint was barred by the New Jersey immunity act.<sup>225</sup>

While admitting that, "The protection of charitable organizations from liability in damages for otherwise just claims arising from their negligence is losing support throughout the country",<sup>226</sup> the court decided that the suit by the parents was barred by the immunity statute. Finding that a "statute should be construed in light of probable legislative intent in the context of an evolving common law",<sup>227</sup> the court decided that the statute was enacted by the legislature to protect the charity from the ordinary negligence of its employees.<sup>228</sup> The dissent and commentators have criticized the holding because it does not take into account the intentional character of the

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80-T01 (N.J. Super. Ct. App. Div. 1982), *aff'd*, 95 N.J. 530, 472 A.2d 531 (1984) [hereinafter Complaint].

223. *Id.* The complaint also stated that the Archdiocese notified the boy's parents that it would help with the medical expenses, provided that the matter was not made public. See Complaint, *supra* note 222, at 6.

224. *Id.*

225. In 1958, New Jersey has abolished the common law charitable immunity doctrine and replaced it with a statute that reads in part:

No nonprofit corporation, society or association organized exclusively for religious, charitable, educational or hospital purposes shall, except as is hereinafter set forth, be liable to respond in damages to any person who shall suffer damage from the negligence of any agent or servant of such corporation, society or association, where such person is a beneficiary, to whatever degree, of the works of such nonprofit corporation, society, or association; provided however, that such immunity from liability shall not extend to any person who shall suffer damage from the negligence of such corporation, society or association or of its agents or servants where such person is one unconcerned in and unrelated to and outside of the benefactions of such corporation, society, or association; but nothing herein contained shall be deemed to exempt the said agent or servant individually from their liability for any such negligence.

N.J.S.A. § 2A:53A-7 (West Supp. 1987).

226. Schultz at 538, 472 A.2d at 534. Dean Prosser notes that "[t]he immunity of charities is clearly in full retreat." PROSSER, LAW OF TORTS at 787- 89 (2d ed. 1955).

227. *Id.* at 539, 472 A.2d at 536.

228. *Id.* But the court leaves open the consequences of whether immunity should cloak those with a reckless disregard for the safety of others. *Id.* The court also states: "Perhaps the time has come for the Legislature to consider again the scope of the law and its intended application to new theories of liability. *Id.*"

defendant-employee's acts.<sup>229</sup>

These persons who think that the Archdiocese should be brought to trial for its negligent hiring of Brother Edmund, argue that the New Jersey statute was based upon the common law immunity doctrine and that, "It is evident that in the commission of an intentional tort, the wrongful conduct is so far removed from the beneficent purposes of the charity that it would serve no salutary societal goal to accord immunity from liability. The immunity protects the charity in its normal endeavors, and not in activities that are antithetical to its charitable ends."<sup>230</sup> The significance of Brother Edmund's willful conduct in sexually abusing the boy was not lost on the dissent or on the commentators; it is not lost on society or the legislatures enacting such immunity statutes. Furthermore, the liability of those who "should have known" is seen as the more proper forum for recovery since it is here that the economic loss can best be redressed.

Should the church or cleric involved with the predicament of pedophilia be without the protection of such charitable immunity doctrines as that just described in New Jersey, the liability of "one who knows or should have known" will be decided in court. For instance, two years before the *Schultz* case, the Supreme Court of New Jersey decided *DiCosala v. Kay*<sup>231</sup> and

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229. See Note, *Torts—Charitable Immunity—Exception for Negligent Hiring Does Not Exist Under New Jersey's Charitable Immunity Act*, 15 SETON HALL L. REV. 907, 924 (1985): "Given the edict that the immunity statute was not intended to expand the common law, the failure of the *Schultz* majority to note the absence of any prior case granting immunity from an intentional tort is shortsighted." *Id.*

230. *Schultz* at 549, 472 A.2d at 541-42. In relying upon a public policy basis and thereby associating charitable immunity with the specific purpose of the charity, surely the actions of Brother Edmund, providing no benefit to the abused boys, were not protected by the state statute. But does this address the nature of the tort involved: the tort of negligent hiring? The dissent does not resolve this, but does say that "... our [New Jersey] courts had not definitively resolved the question of whether negligent hiring is an exception to the immunity doctrine." *Id.* at 554, 472 A.2d at 544. And again, "[w]e had no occasion, however, to deal with the specific tort of negligent hiring' with respect to the wrongful conduct of an employee acting beyond the scope of his employment and beyond the reach of the *respondeat superior* doctrine." *Id.* at 555, 472 A.2d at 545. But the dissent concludes nonetheless that "negligence [in hiring] clearly undermines the essential capacity of the charity to do charity and to benefit its intended recipients." *Id.* at 556, 472 A.2d at 545. "Such negligence on the part of a charity properly stands as an exception to the immunity conferred by statute." *Id.*

231. *Di Cosala v. Kay*, 91 N.J. 159, 450 A.2d 508 (1982). This case also involved the tort of negligent hiring or retention of incompetent, unfit or dangerous employees. A young boy had been accidentally shot in the neck in the living quarters of his uncle, a camp ranger, on Boy Scout campgrounds. A 19 year-old camp counselor had fired the pistol in jest and the boy had suffered "severe and crippling injuries." *Id.* at 165, 450 A.2d at 511. The parents of the boy filed suit against the Boy Scouts for compensation and the Boy Scouts moved for a summary judgment on the grounds that the counselor was not acting within the scope of his employment at the time of the accident. Also, as a charity they were protected under the New Jersey immunity statute. *Id.* at 167, 450 A.2d at 512.

found that, "An employer whose employees are brought into contact with members of the public in the course of their employment is responsible for exercising a duty of reasonable care in the selection or retention of its employees."<sup>232</sup> And in a statement that would apply to the facts of the *Schultz* case: "[T]he negligent hiring theory has been used to impose liability in cases where the employee commits an intentional tort . . . where the employer either knew or should have known that the employee . . . might engage in injurious conduct toward third persons."<sup>233</sup>

The New Jersey court reversed a grant of summary judgment in favor of the defendant Boy Scout Camp and allowed the case to go to the jury to determine the negligence of the Camp in hiring its employees. The court allowed to stand the decision that the Camp was not protected under the state's immunity statute because the injured boy was not a beneficiary of the charitable entity.<sup>234</sup> Also, "a higher degree of care is often required to be exercised towards young children than to adults similarly situated."<sup>235</sup> A greater degree of care is required with respect to dangerous instrumentalities, in this case the pistol and the fact that the camp knew that its employee kept pistols on the Camp grounds.<sup>236</sup> In summary, the charitable Boy Scout Camp was not protected by the charitable immunity statute existing in New Jersey, public policy considerations surrounding guns and children affected the court's decision, and the tort of negligent hiring was allowed to go to the jury for its deliberations concerning negligence and liability. The charity is left with few defenses.<sup>237</sup>

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232. *Id.* at 171, 450 A.2d at 514. Furthermore, "[i]f liability results it is because, under the circumstances, the employer has not taken the care which a prudent man would take in selecting the person for the business at hand." *Id.* When an employer neglects this duty and as a result injury is occasioned to a third person, the employer may be liable even though the injury was brought about by the wilful act of the employee beyond the scope of his employment. *Fleming v. Bronfin*, 80 A.2d 915, 917 (D.C. Mun. App. 1951).

233. *Di Cosala* 91 N.J. at 173, 450 A.2d at 515. The test announced by the court was: "whether a reasonably prudent and careful person, under the same or similar circumstances, should have anticipated that an injury to the plaintiff or to those in a like situation would probably result from his conduct." *Id.* at 517-18. The fact that the Boy Scouts had hired the uncle of the camp counselor and knew that the uncle owned guns, that the camp counselor had access to the home of the uncle where the shooting took place, placed upon the Boy Scout Camp a duty to the plaintiff-boy. The issue was whether or not the camp had breached that duty by hiring and retaining the uncle.

234. *Id.* at 167, n.5, 450 A.2d at 512 n.5.

235. *Id.* at 180, 450 A.2d at 519 (citations omitted).

236. *Id.* at 179, 450 A.2d at 518 (citations omitted).

237. In addition to the need to effectuate professional hiring practices, charities could achieve some protection through insurance and, in the case of child abuse, a recent public concern over unfounded allegations of child abuse. See Besharov, *Unfounded Allegations—A New Child Abuse Problem*, 83 PUB. INTEREST, 18,19 (1986): "The nation's child protective agencies are being inundated by unfounded' reports; about 65% of all reports must be dis-

Just as criminal liability can result for the abuser and the "one who knows" and has a duty to report the abuse, so can civil liability in tort result for these same persons. While the abuser is responsible for the intentional infliction of emotional harm, the "one who knows" is responsible for civil liability resulting from the statutory duty to report. Also, even if that duty to report is negated by the free exercise argument that the abuse was discovered in a confessional setting, there remains a civil responsibility for negligent hiring or retention of persons who could "reasonably be suspected of committing harm to others." Is there immunity under an applicable charitable immunity statute? Increasingly, the answer is no. May the charitable employer say that it learned of the "unreasonable" behavior of its employee within a confessional setting and that it may not use such knowledge to the detriment of the penitent-employee? The free exercise clause has not been tested to give an answer. But the consequences to the employee, the employer, and certainly the public are severe and at present the only response to the possibility of litigation and injury is extreme prudence. The predicament surrounding the clergy is newly discovered and yet ancient in origin.

#### IV. RECOMMENDATIONS

All recommendations as to what to do in light of the legal predicament of clerics confronting the issues surrounding pedophilia pertain to the cleric and those working with the cleric to effectuate his or her ministry. This Article has consistently demonstrated through discussions of the expanded definition of child abuse, the developing comprehensive programs available to pedophiles, the unsettled nature of the free exercise clause and expanded tort theories, that the predicament of the cleric is not available to easy or quick solution. Also, because the issue is so volatile, solution will continue to be exasperated. But that does not suggest that an attempt cannot be made. Indeed, churches and clerics have already taken steps to address the issues surrounding pedophilia and these recommendations that follow are offered as complementing those.

First. Clerics and religious denominations must examine ministry formation programs and continuing education efforts. Within all programs there must be an effort to identify and provide treatment for those persons affected by pedophilic tendencies. Such a recommendation encompasses the duty the cleric and the denomination owes to the person who could be abused, the

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missed after an investigation." Responding to false charges of abuse, "a national group of parents and professionals has been formed to represent those falsely accused of abusing their children. Calling itself VOCAL, for Victims of Child Abuse Laws, the group publishes a national newsletter and has about 3,000 members in almost 100 chapters formed or being formed." *Id.* at 32-33.

dignity of the potential abuser, and the integrity of the denomination itself. Ignoring the fact that persons in every profession are possible abusers and that any stereotype of an abuser as a "dirty old man" is simply incorrect; the medical evidence and recent cases testify to the fact that pedophiles are presently clerics and there are certainly more in formation programs seeking to enter the clerical profession. Persons responsible for formation or employment must take decisive action.

Second. Clerics and religious denominations must apply strict measures of accountability. If there is a permissive atmosphere to religious dogmas concerning morality and behavior, these dogmas should be clarified. The inescapable conclusion to be drawn from the criminal and civil prosecution of clerics and denominations is that society will not condone conduct found to be socially repulsive; the free exercise clause protects beliefs and not conduct.

Third. Dogmas or creedal formulas concerning penance or "confession" should be examined within the context of therapy, privacy, confidentiality, and religious significance. While the free exercise issues have not been resolved in reference to confession v. reporting, confession v. hiring of an employee, or confession v. privilege, the present cases indicate that the stricter the association with religion, the more likely will the protection of the free exercise clause apply.

Fourth. Although changes in society should never be used as an excuse to explain the behavior of a cleric or religious denomination, increases in poverty among children, single-family households, sexual promiscuity, advances in medical technology and the presence of a litigious society all contribute to the cleric's predicament. Isolation cannot be tolerated on the part of a cleric. Education must encompass how these societal factors affect the cleric's role, the manner in which he or she is perceived and the dangers to be avoided or at least anticipated. Education as prophylactic must be fostered.

Fifth. Clerics and denominations should initiate procedures by which they can respond honestly, immediately and conclusively to all allegations of child abuse. This would include: (1) Distribution of state reporting statutes to all clerics and all those employed by a denomination that could come within the scope of the reporting statute; (2) Educating those with a reporting requirement as to the nature and definition of abuse and the Battered Child Syndrome; (3) Providing strict precautions in the hiring of employees, especially when those employees affect children. Current employees should also be examined; (4) Provide for the proper notification of the authorities whenever any instance of child abuse is discovered outside of the most

strictly defined confessional setting; (5) Provide for the equitable and prompt treatment of the alleged abuser pending the determination of the complaint; (6) Respond to the abused person with dignity and promptness, with strict procedures for determining veracity and perspective.

Sixth. Identify, train and support a person within the denomination to address the human aspects of the cleric's life. Alcohol and drugs are often associated with the pedophile and these should be seen as warning signs of possible pedophilic activity. Thus, these problems should be addressed immediately. The resources of the faith-spiritual community, and where applicable, fraternal correction, should be utilized. Religious superiors are not solely responsible for support and correction. In addition, clerics and denominations should take advantage of existing support groups or initiate such efforts. These would include Alcoholic Anonymous, Narcotics Anonymous, Weight-Watchers and in some localities there are groups for pedophiles.

Seventh. If a secular purpose can be attributed to the religious practice of confession, and that purpose is to provide an anonymous forum for the pedophile to confront his or her compulsion, then the confessor must be educated as to making recommendations concerning treatment. This is not a recommendation that the confessional setting be transformed into a counseling opportunity; such a transformation would have an effect upon the priest-penitent privilege and the possibility of clergy malpractice. Nonetheless, education of the clerical confessor must include alternative forms of treatment consonant with a possible religious objective of not sinning again. Medical technology has provided assistance in this regard and confessors should be made aware of the possibilities. The cleric and the denomination should also consider the moral significance of many current modalities of treatment.

Eighth. Clerics must be educated as to distinctions to be made today within the law. For instance, the new theories of clergy malpractice, civil and criminal penalties associated with the reporting statutes, privacy issues and consequences of revealing matters that the "penitent" considers confessional or at least confidential and the cleric thinks dangerous enough to disclose to authorities. Penalties for child abuse and, where applicable, church canons should be made available to the cleric.

Ninth. Denominations should apprise themselves as to the current law surrounding charitable immunity, tort responsibility, and statutory privilege and reporting requirements. Once done, they should work in an ecumenical effort to respond to society's sense of crisis with positive support and constructive suggestions.

Tenth. As part of its duty to educate all concerned, clerics and denominations should assist parents in providing a program of sex education so that children will understand appropriate adult behavior towards them. Since it has been demonstrated that the prior existence of pedophilic activity in a child contributes to future activity, it is necessary to discourage any such activity from taking place. Acknowledgement that difficulties in the home and society will result in more potential for abuse, invites religious denominations to take a more aggressive role in educating the young in human sexuality.

### CONCLUSION

It is plausible to estimate that medical technology contributed to the present legal predicament of clerics in reference to pedophilia. Science has made it possible to identify the symptoms of child abuse and predict its consequences; science has made it possible to debate the criminal and civil liability of a woman's conduct towards her fetus when that conduct concerns alcohol, sexual habits, diet or narcotics; science brings us to the brink of treating the pedophile with dignity, but affords us no permanent cure; science calculates the pain and suffering of the abused child and his or her parents for the civil court, but also predicts the continued compulsion of the pedophile incarcerated; and finally, science justifies the cleric's claim to certain evidentiary privileges, but then denies the cleric any utilization due to the sexual or moral nature of the treatment. Surely science shall continue to pester the cleric and the legal predicament of pedophilia.

The legal process in the federal and state courts also contributes to the predicament. The lack of a clear and objectional formulation of the freedom of a person to exercise his or her religion places the cleric in the same tenuous dilemma as the woman seeking to know the parameters of privacy and potential consequences of fetal abuse. Likewise, distinctions made among confession, counseling, spiritual guidance, psychotherapy and medical and legal services are confusing and invite the courts or the legislators into those activities forming the core of any penumbra of American society. Surely the debate over privacy, judicial restraint or activism, and compelling state interest will all affect the legal predicament of clerics and pedophilia.

Society too contributes to the predicament. The catastrophic increase in the number of abused children—with the sure knowledge that many incidents of abuse are not reported—demands a response. In those instances where the abuser is a cleric, he or she is entitled to the treatment afforded any citizen, no more or less. But in a society that has become affected by poverty, illegitimacy and change in the historical definition of family, the



definition of "one who knows" expands to include denominations, legislators and citizens. All have a responsibility to protect the best interest of children.

Protection of this best interest is provided in the criminal sanction against the abuser. But all should be aware of the medical technology available so as to rehabilitate the pedophile in a manner that protects the dignity of the person and the prevention future abuse. Stereotypical assumptions should be displaced with facts. And while the criminal law may also require persons in particular situations to report all instances of abuse, requirements of reporting should safeguard the traditional and fundamental heritage of a constitutional form of government. Emotion should not obfuscate privileges intrinsic to explicit constitutional rights. Certainly the secular purposes of some of those privileges deserve better examination and debate as well.

The civil liability of the abuser is both recent and often overlooked in favor of the greater economic resources of the "one who knows." But just as in criminal prosecution, should the abuser batter or intentionally inflict emotional harm upon a child, society has a right and a duty to provide for redress. Much of the medical evidence suggests that the abused child may suffer in perpetuity; the abuser initiates a succession of pedophilic acts. Theories that redress this civil harm are compelling and warranted. So too, theories that provide for a presumption of liability resulting from a reporting statute, and those that provide for reasonable care in hiring are just and equitable. But again, as with criminal laws, the sanctity of constitutional safeguards regarding religion and fundamental rights should not fall victim to emotion.

Every author, judge, physician or researcher writing about pedophilia admits that the issue is complicated and charged with emotion. Recently there has been an effort on the part of state government to stop pedophilia through expansion of reporting requirements and elimination of reporting privileges. This is the gist of the present predicament facing clergy. But we have also seen a number of clerics indicted and convicted of pedophilia itself; these convictions heighten the emotion of the predicament. There has also been revelations concerning the medical condition of the pedophile and the call to address the person with dignity. This confronts the cleric's predicament with a dilemma: giving in to the desire to prevent the abuse or providing a chance for the abuser to be forgiven and begin a process of firm resolve not to sin again through treatment. This dilemma is probably being confronted at this moment. The point of this Article and of the many changes that have come about through medicine, law and society in recent years is to demand that all concerned work together in reason to promote the greatest good.